TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 89.

THE SPRINGER LAND ASSOCIATION ET AL.,
APPELLANTS,

vs.

PATRICK P. FORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED DECEMBER 9, 1895.

(16,108.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1897.

1 Be it remembered that heretofore, to wit, on the twentieth day of July, 1893, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certain transcript of record from the district court in and for the county of Colfax, in said Territory; which said transcript is in the words and figures following, to wit:

2 *Transcript of Record.*

TERRITORY OF NEW MEXICO, }
Fourth Judicial District, County of Colfax. }

Be it remembered, that heretofore, to wit: on the thirtieth day of June, in the year eighteen hundred and ninety, Patrick P. Ford, by his solicitors, filed in the office of the clerk of the district court of the fourth judicial district, of the Territory of New Mexico, sitting within and for the county of Colfax, his bill of complaint, which said bill of complaint is in words and figures following, to wit:

Bill of Complaint.

In the District Court for the Fourth Judicial District of the Territory of New Mexico, Sitting in and for the County of Colfax.

To the Hon. James O'Brien, chief justice of the supreme court of the Territory of New Mexico, and judge of the district court, sitting in and for the county of Colfax for the trial of causes arising under the laws of said Territory:

Your orator, Patrick P. Ford, a resident of the State of Colorado, by his solicitor, J. D. O'Bryan, Esq., complains of the Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, Wm. A. Comstock, the Springer Land Association, a corporation of the Territory of New Mexico, the Maxwell Land Grant Company, a corporation, Rudolph V. Martensen, Chas. Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter and Frank Springer, trustees of the said Maxwell Land Grant Company, acting under the name, style and title of the board of trustees of the Maxwell Land Grant Company, and complaining says:

That, to wit, on the 20th day of October, 1888, your orator entered into a certain contract with the Springer Land Association,
3 an unincorporated body composed as your orator is informed, and so states the fact to be, of the following-named persons, to wit: Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames and William J. Comstock, which said contract is in writing, and a copy whereof is attached to the mechanics' lien hereinafter *and* referred to, and a copy of which said lien, together with all indorsements thereon, and of said contract, is hereunto attached and made a part of the bill, whereby he contracted to furnish all necessary tools and labor, and perform all

the work of grading required in the construction of the Cimarron ditch, and its accessories, in accordance with the terms of said contract and specifications thereto attached.

That the said ditch is called the Cimarron ditch and is situate in Colfax county, Territory of New Mexico, and begins at a point where the Ponil and Cimarron rivers meet to form the Cimarron, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax aforesaid, being in length about twenty-six miles; and the said ditch has appurtenant thereto, along its entire length, land as passageway about sixty feet in width; as also lateral ditches and reservoirs, and the land covered thereby, and also appurtenant to said ditch twenty-two thousand acres of land in said county, and under said ditch, and to be irrigated thereby, and described as follows, to wit: Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east. And sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east.

All of which ditch, laterals, reservoirs and lands as aforesaid are plotted and laid out on the plan, and which is made a part of this bill.

And your orator further avers, that he began the said work on the said ditch, on or before to wit: the first day of November, 1888, and prosecuted the same continuously until to wit: the twenty-first day of June, 1889, when the said work was completed in substantial compliance with the said contract, and was then and there accepted.

And your orator further avers, that he was an original contractor in the work on the said ditch, and that within ninety days after the completion of the said work, he filed for record with the county recorder of Colfax county, a claim containing a statement of his demands, together with the description of the property to be charged with a lien, in accordance with the terms of an act of legislature in such cases made and provided, which said claim was verified by the oath of your orator, and filed for record July 3rd, 1889, and
4 recorded in Book "H" of the said recorder's office, page 1 to 8, as required by law.

And your orator further avers, that the said The Springer Land Association, at or about the time of the commencement of the said work by your orator, but at what particular time your orator is unaware, transferred unto the Springer Land Association, a corporation duly organized under the laws of the Territory of New Mexico, all their right, title and interest in and to the said work, and to the ditch and land, with the accessories there-, but your orator is unable to state the terms or nature of the transfer and assignment, the same being exclusively within the knowledge of the said association and the said corporation.

And your orator avers that during the greater part of the time that he was engaged on the work on the said ditch and reservoirs, he was in communication with the officers of said corporation, and

received part payment on said contract work, from time to time from them through their said officers and agents, and that in all things the said corporation acting as aforesaid, through their agents and officers, claim to be the owners of the said ditch, land, reservoirs and other property above described.

And your orator avers, that the said The Springer Land Association, the corporation aforesaid, by its acts and conduct with your orator, assumed the obligations of the Springer Land Association, in reference to said contract with your orator, and thereby became and are liable to your orator on the said contract, along with the said The Springer Land Association, and the persons who composed the latter association.

And your orator further avers that prior to the making of the contract with your orator, as above stated, the Maxwell Land Grant Company, who your orator is informed and believes, and so states the fact to be, owned the land hereinbefore mentioned, and still claims to have some right, title or interest in the said land, had entered into a contract by which the Springer Land Association was to have the right to construct said ditch and its reservoirs and accessories, on the land of the said Maxwell Land Grant Company, and by which the said land, as well as the twenty-two thousand acres of land above described, was to belong to the said, The Springer Land Association, but the exact nature of said contract, its terms and conditions, are unknown to your orator, the same being in the exclusive knowledge of the said Maxwell Land Grant Company, and the said The Springer Land Association, and the other parties defendants, and which said contract your orator prays may be fully disclosed, and set forth in the answers of the said defendants.

And your orator further avers, that during the whole time that he was doing the work on the said ditch, reservoirs and accessories thereto, the Maxwell Land Grant Company, and the Springer
5 Land Association, the corporation aforesaid, had knowledge that the work was being done on the ditch and land, yet neither of the said corporations and association gave any notice, either within three days after such knowledge was obtained, nor at any time, that they, or either of them, would not be responsible for the construction of the said ditch, and no notice as above was given in writing, by posting, or in any other manner to your orator.

Your orator avers that at the time of the completion of the work on the said ditch, as aforesaid, and of the acceptance of the same, there was due and owing to him on his said contract, by the Springer Land Association, and the individuals composing the same aforesaid, and by the Springer Land Association, the corporation aforesaid, a balance of money amounting to the sum of seventeen thousand six hundred thirty-four dollars and twenty-seven cents, for work done under the contract, and also the further sum of three hundred and ninety dollars for extra excavating and hauling, ordered by the engineer in charge of the said work, and which said amount was allowed by the said engineer, in pursuance of the provisions of the said contract.

And your orator avers that these two amounts were and are due

to your orator, as aforesaid, but that notwithstanding that the same is justly due to your orator, the Springer Land Association, and the individuals composing the same above named, as well as the Springer Land Association, the corporation, have refused, and still do refuse to pay the same or any part thereof.

Your orator therefore prays that the said The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, The Springer Land Association, the corporation, may make full answer under oath as to the transfer of the contract made by the Springer Land Association, with your orator, to the Springer Land Association, the corporation, and that they make answer to the other allegations and matters contained in this bill, but as to those matters an answer under oath is hereby specially waived.

And your orator further prays that the Maxwell Land Grant Company, and the persons hereinbefore named as trustees of the same, may disclose, and set forth, and if the same is in writing, may attach to their answer a copy of the contract entered into with the Springer Land Association, or with any person on their account, by the said Maxwell Land Grant Company, or by the receiver of the same, or by any other person on account of the said company, by which it was agreed that the said ditch might be built or constructed, and by which any and what land of the said Maxwell Land Grant Company would be given, sold, or otherwise de-
6 voted to the Springer Land Association, or to any person for its use, or by which the said association became or are entitled to any interest in any land of the said Maxwell Land Grant Company, and that their answer as to this matter shall be under oath, but as to all other matters and things proper to be answered unto, as set forth in this bill, shall not be under oath, an answer under oath being hereby specially waived.

And your orator further prays, that an account may be taken under the direction of this court, and when the sum is ascertained that is justly due your orator, a decree be entered against the said The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, and the Springer Land Association, the corporation above named, for the payment of the amount so ascertained to be due your orator, together with the costs and charges of this suit, and the cost of filing his lien, and for a reasonable counsel fee for complainant's counsel; and for a foreclosure of the said mechanics' lien against the ditch, laterals, reservoirs, and accessories, and the land hereinbefore described, and against the last above-named defendants, and also the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, and that it be decreed that the said property be sold for the payment of the debt found to be due, your orator, together with the costs and charges expended and incurred in this suit, and counsel fee as above stated, which your orator alleges to be 10 per cent. of the amount of said debt so to be ascertained.

And your orator further prays that if by such sale of the property subject to the lien, there should be a deficiency of proceeds to pay your orator in full, that a decree be entered for such deficiency against the said The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, and the Springer Land Association, the corporation aforesaid, and that said judgment and decree be docketed and execution issued thereon as provided by law.

And that subpœna issue from this honorable court, directed to the said The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, the Springer Land Association, a corporation, the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter and Frank Springer, trustess of the Maxwell Land Grant Company, commanding them and each of them to be and appear before this honorable court, on a cer-
7 tain day and under a certain penalty therein to be fixed, then and there to answer all and singular the allegations, matters and things therein set forth, and to stand abide and perform by such order and decree in the premises, as shall seem, meet and agreeable to equity and good conscience.

P. P. FORD.

J. D. O'BRYAN,
Solicitor for Court.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Personally, appeared before me, Patrick P. Ford, who being duly sworn, deposes and says that he has heard read the foregoing bill in equity, and is acquainted with the contents thereof, and that all the facts therein stated are true, except such facts as are stated upon information and belief, and as to them he believes them to be true.

Sworn and subscribed to, before me, this 27th day of June, 1890.

GEORGE E. VAN HEYNIGEN,
[SEAL.] *Notary Public.*

My commission expires April 10th, 1894.

Copy of Claim of Lien.

TERRITORY OF NEW MEXICO, }
County of Colfax, } *ss:*

PATRICK P. FORD, Contractor,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company; Rudolph V. Martensen, Chas. Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Owners or Reputed Owners.

This is to give notice that Patrick P. Ford hereby files this, his claim of lien, as an original contractor, with the county recorder of the county of Colfax, Territory of New Mexico, against all that certain ditch, canal and reservoir, commonly known as the Cimarron ditch and its accessories, the said ditch beginning at a point where the Ponil and Cimarron rivers meet to form the Cimarron, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax, Territory aforesaid, being in length about 26 miles; and the said ditch and land appurtenant thereto for right of way, being of about the uniform width of sixty feet, together with all lateral ditches and reservoirs, and the land covered by, and appurtenant to the same, as aforesaid, as also
8 twenty-two thousand acres of land appurtenant to said ditch, the said land being also in said county, and under the ditch to be irrigated thereby, and described according to the townships and sections, to wit:

Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east. And sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east, all of which ditch, laterals, reservoirs and lands as aforesaid are plotted and laid out on the plan hereto attached and made a part of this claim of lien to secure the payment of the sum of seventeen thousand six hundred and thirty-four dollars and twenty-seven cents ($17,634.27), the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said The Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of

lien. As also for the further sum of three hundred and ninety dollars ($390.00) for extra excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract; all of which having been begun on, to wit, the first day of November, 1888, and prosecuted continuously until the twenty-first day of June last past, the said work being on the said last date then completed and accepted, the same being within ninety days from the completion of said ditch.

The names of the reputed owners of the land hereinbefore mentioned are the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, trustees of said company acting under the name, style, and title of the board of trustees of the Maxwell Land Grant Company.

Claimant was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president.

The terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof.

PATRICK P. FORD.

TERRITORY OF NEW MEXICO, }
County of San Miguel, } *ss:*

Patrick P. Ford, being duly sworn, doth depose and say that he is the claimant above named, and that he has read the foregoing claim of lien, and that the facts therein stated are true, except such facts as are stated upon information and belief, and that as to such facts he believes them to be true.

Witness my hand and seal, at Las Vegas, N. M., the second day of July, A. D. 1889.

CHARLES RUDULPH,
[SEAL.] *Notary Public.*

Commission expires March 23rd, 1892.

Contract and Specifications for the Cimarron Ditch.

Contract.

This agreement made and entered into this 20th day of October, 1888, by and between P. P. Ford, party of the first part, and the Springer Land Association (by C. N. Barnes, general manager, approved by C. C. Strawn, president), a duly organized association, party of the second part, witnesseth: That for and in consideration of the covenant and agreements hereinafter set forth, the parties hereto mutually agree and bind themselves as follows: The party of the first part agrees to furnish all necessary tools and labor, and perform all the work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance to the specifications hereto attached and made a part of this contract.

Said first party agrees to begin work within ten days after signing this contract, and to complete the same on or before July 1st, 1889. The party of the second part agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification. And the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached. It is hereby mutually agreed that as the substance of clause "X" for ten of the specifications, concerning the time in which said work is to be completed, is of vital importance to the company, no extension of time beyond the date fixed shall be asked or granted, except for causes mentioned, and that the failure of the contractor to fulfill the obligations herein assumed will work a forfeiture to the company of all the retained percentage accumulated to that date, and shall be considered by both parties in the light of liquidated damages retained by the company through such failures. In witness whereof, we have hereunto set our hands and seals this 26th day of October, A. D. 1888.

P. P. FORD,
C. N. BARNES,
General Managers Springer Land Association.

Approved by—
C. C. STRAWN,
President Springer Land Association.

Specifications.

For the grading of the Cimarron ditch:

1. Gradations.—Under this general head will be included all excavations and embankments required for ditch and reservoirs; all excavations required for foundations of flumes and gates and other structures, and the grading approaches to bridges, as well as any and all kind of grading work incident to the completion of the work herein contemplated.

2. Excavations.—All excavations for ditches will be made to the full width and depth, and for such slopes as shall be indicated by the engineer. Bottom of ditches shall be smoothly dressed to grade, level across, and cleared of all loose stones and other matter, which might make a rough or uneven surface. Slopes will be smoothly dressed to conform to the straight or curved line indicated by the stakes. All excavated material will be classified as earth.

3. Embankments.—Materials taken from excavations will be placed in adjoining embankments as follows: First. The bank on the lower side of the ditch will be built to the full height and width, indicated by the engineer, a berm of four feet width being left between inner top of bank and edge of excavation. Second. The remaining material will be used on level ground to build the bank on upper side. Third. Any excess of material will then be wasted on the outside of lower bank, but never piled in hills on top of bank. The price for excavation includes a free haul of one hundred feet. Material for greater distance will be paid for at the rate

of two cents per one hundred feet or fraction thereof in excess of the haul distance.

4. Special embankment.—There will be built across several depressions, to serve as settling basins and to increase capacity of small reservoirs. They will be built in every case by borrowing material from the inner or water side of the embankment. No borrow pit will be allowed nearer than fifteen feet from the toe of the bank. Material used will be placed in layers not more than ten inches in thickness, driving lengthwise the bank in every case. All banks shall be built to such additional height*h* to compensate for shrinking or settling, as the engineer may direct, with extra charge. The side of these banks will be deeply plowed with parallel furrow, four feet apart, lengthwise of the bank, before filling is begun.

Reservoir No. 7.—The embankment for this reservoir will be as follows: First. The site will be deeply plowed lengthwise, under strips of four furrows inside each, with spaces of six feet between the strips. Second. On the line marked for the top of the embankment a trench eight feet wide and one to four feet deep will be executed, the material being placed in the outer side of the embankment. The trench will then be filled with borrowed material, wheel scrapers being used and driven lengthwise. The cost of this preparatory work, aside from the yardage of the trench, will be included in the price named for the embankment. All material used in this embankment will be borrowed from the inner or water side, leaving a beam of twenty-five feet from the toe. The price named for embankment will include the total haul, as no over-haul estimate will be made. The dimensions of this bank will be as follows: Width on top, twelve (12) feet; inner slope, three (3) feet horizontal to one (1) foot vertical; the outer slope will be one and one-half ($1\frac{1}{2}$) to one (1). The greatest height on center line will be twenty-six (26) feet.

11

5. Borrow.—In case the excavation should fail to furnish sufficient material for adjacent embankment, these will be completed from borrowed pits; no such pits being allowed nearer than fifteen (15) feet from the toe of the embankment. Borrowed material will be measured in embankment, and *paye*d for the same at same rate as other work.

6. All risk of damage or loss to the work from floods, or other casualties, will be assumed by the contractor, until his work has been accepted, and no charge for loss or deterioration on this account will be allowed, but a reasonable extension of time may be granted by the engineer.

7. Contractors must carefully *pe*rserve all stakes and bench-marks, and persistent destruction of these will involve a charge for resetting.

8. Contractors will not sell, or allow to be sold, any intoxicating liquors on or near the work. Disorderly or quarrelsome persons will be discharged at the request of the engineer. It is specially stipulated that should the contractor or any other person, directly or indirectly connected with the work, establish a store or commissary so called, for the sale of supplies or other goods to employees,

such store or commissary shall be conducted honestly and fairly, and on a plan of strict justice. The company is determined that the practice of defrauding employees through the medium of false or extortionate charges shall not prevail on this work. The right is therefore reserved by the company to absolutely annul this contract as to any uncompleted work at any time on satisfactory and unrefuted proof being rendered. The violation of this rule will be considered a breach of contract, and will work a forfeiture of all retained percentages to that date.

9. Contractors must inform themselves by personal examination as to the nature of the soil, the general features of surface, accessibility and all other matters affecting the contract. The quantities given by the engineer are approximate only, nor will any information furnished by the engineer or his assistants on any of the above points, relieve the contractor of any part of his obligation to fully complete his work. The contractor will give personal attention to the work.

12 10. Time.—As the time specified for the time of completion of the work herein contemplated is an essential feature of the contract, no extension of time will be granted, provided, however, that should the work be seriously delayed by continuously inclement or hard freezing weather, or the like unavoidable cause, the engineer may, at his discretion, grant an extension of time equal to that so lost. If at any time during the progress of the work the engineer shall judge that the force employed is insufficient to insure its completion within the limit of time stipulated in the contract, he may order an increase of force as will, in his judgment, accomplish the desired purpose, and the contractor, on receiving written notice to that effect, will immediately take the necessary steps to comply therewith.

11. Extra work.—No extra work will be allowed or paid for unless done under written order from the engineer, which order shall bear as an endorsement the agreed price for the same. In case of disagreement between the parties to the contract, as to the intent and meaning of any part of these specifications, such matter shall be referred to the engineer, and his decision shall be final and binding on both parties.

12. Damages.—The contractor will be held strictly responsible for all damages to the property or crops of persons along the line of work.

13. Subcontracts.—Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontractor will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer.

14. All orders of the engineer concerning any part of the work must be promptly obeyed.

15. Estimates.—On or about the first day of each current month, the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the

same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten (10) per centum retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfil his obligations will work a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate, will only be paid upon satisfactory showing that
13 the work is free from all danger, from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work.

14 And afterwards, to wit, on January 3rd, 1891, there was filed in said clerk's office, an answer of the defendants, which said answer is in words and figures as follows, to wit:

Answer of Defendants.

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District of the Territory of New Mexico, Sitting in and for the County of Colfax.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } No. 1301. Chancery.

The answer of the Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, the Springer Land Association, a corporation of the Territory of New Mexico, to the bill of complaint of Patrick P. Ford.

The said defendants above named, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception, which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained for answer thereunto, or to so much and such parts thereof as these defendants are advised, it is material or necessary for them to make answer unto answering, say:

That they admit that on, to wit: the 20th day of October, A. D. 1888, the complainant, Patrick P. Ford, entered into a certain contract with the Springer Land Association, an unincorporated body composed of the following-named persons, to wit: Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames and William J. Comstock at said date, which said contract is in writing, and that a copy of said writing is attached to the copy of the mechanics' lien in the bill of complaint

referred to, but whether the copy attached to this bill of complaint, purporting to be a copy of the mechanics' lien in said bill referred to, is a true and correct copy, these defendants do not know and are not informed, and therefore are unable to admit or deny, and whether the alleged copy of said alleged mechanics' lien contains all endorsements thereon, these defendants do not know and cannot admit or deny. Defendants admit that by virtue of the said written contract, a copy of which purports to be attached to the bill of complaint, that the complainant contracted to furnish all necessary tools and labor and to perform all the work of grading required in the construction of the Cimarron ditch and its accessories, and in accordance with the term- of said contract and the specifications thereto attached, and admit that said written contract was by the Springer Land Association and said Christopher C. Strawn, C. N. Barnes, Melville W. Mills, Frederick J. Eames, William A. Comstock, transferred to The Springer Land Association, corporation, defendant herein.

These defendants further admit, that the said ditch was called the Cimarron ditch, and was situate in Colfax county, Territory of New Mexico, and begins at a point where the Ponil and Cimarron rivers meet to form the Cimarron river, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax aforesaid, being in length about twenty-six miles; and that the said ditch has and appurtenant thereto along its entire length, land as passageway about sixty feet in width; as also lateral ditches and reservoirs, and the land covered thereby, and also appurtenant to said ditch, twenty-two thousand acres of land in said county, and under said ditch, and to be irrigated thereby and described as follows, to wit: Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east. And sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east; all of which ditch laterals, reservoirs and lands as aforesaid, are plotted and laid out on the plan and made a part of the bill of complaint.

These defendants further admits, that complainant began the said work on the said ditch on or before, to wit: the first day of November, 1888, but deny that he prosecuted the same continuously until, to wit: the 21st day of June, A. D. 1889, when the said work was completed with substantial compliance with the said contract and was then and there accepted; and deny that the said work was ever completed in substantial compliance, or in compliance at all with the said contract; and deny that the said work was on the said 21st day of June, A. D. 1889, or at any other time accepted, but to the contrary, these defendants aver that the said work was not on the said 21st day of June, 1889, or at any other time completed by the complainant, or by his procurement in substantial compliance with the said contract, but the same was left and abandoned by the complainant over the protest and objection of the Springer Land Asso-

ciation, in an incomplete and wholly unfinished condition, and has never been accepted or received by these defendants, or by any one or more of them.

These defendants further answering, admit that the com-
16 plainant was an original contractor in the work on the said ditch, but deny that within ninety days after the completion of said work, that he filed for record, with the county recorder of Colfax county, a claim containing a statement of his demands, together with the description of the property to be charged with a lien, in accordance with the terms of an act of legislature in such case made and provided, and de*nies* that any such claim was verified by the oath of complainant and filed for record July 3rd, 1889, and recorded in Book "8," of the said recorder's office, pages 1 to 8, as required by law.

These defendants further answering, admit that the said The Springer Land Association at or about the time of the commencement of the said work by the complainant, transferred unto the Springer Land Association, a corporation duly organized under the laws of the Territory of New Mexico, all their right, title and interest in and to the said work, and to the ditch and land, with the accessories there and therewith connected.

These defendants, further answering, deny that during the greater part of the time that complainant was engaged on the work on the said ditch and reservoirs, that he was in communication with the officers of said corporation, but admit that complainant received part payment on said contract work, from time to time, from said Springer Land Association, through their officers and agents; and admit that in all things the said corporation, through its agents and officers, claimed to be the owners of said ditch, lands, reservoirs and other property in the bill of complaint described.

These defendants, further answering, admit that The Springer Land Association, corporation defendant in this action, by its act and conduct with the complainant assumed the obligations of the Springer Land Association in reference to the said contract with complainant and admit that the Springer Land Association corporation thereby become liable to the complainant on said contract, for any sum which might become due and payable to the complainant, in the event that complainant completed and performed said contract. But these defendants deny that the persons who composed the Springer Land Association, became liable to the complainant on account of work performed on said contract, and deny also that the Springer Land Association corporation became liable along with the said Springer Land Association, for work under such contract.

These defendants, further answering, admit that prior to the making of the contract with complainant, as above stated, that the Maxwell Land Grant Company owned the land hereinbefore men-
17 tioned, and still claim to have some right, title or interest in the said land, and admit that the said Maxwell Land Grant Company had entered into a contract by which the Springer Land Association was to have the right to construct said ditch and

its reservoirs and accessories on land of the said Maxwell Land Grant Company, but deny the said land, as well as the twenty-two thousand acres of land above described, was to belong to the said The Springer Land Association; a copy of which said contract with the said Maxwell Land Grant Company, is in writing, and is attached to this answer as part thereof, to which reference is made for the particular terms of said contract, said copy being marked "Exhibit A."

And the said defendants, further answering, say that they admit that during the whole time complainant was doing work on the said ditch, reservoirs and accessories thereto, the Maxwell Land Grant Company and the Springer Land Association, and The Springer Land Association corporation, defendant in this action, had knowledge that the work was being done on the ditch and land and deny that neither the said association, or either of the said corporations, gave any notice, either within three days after such knowledge was obtained, nor at any time, that they or either of them would not be responsible for the construction of said ditch; and further, deny that no such notice was given to the complainant in writing, by posting, or in any other manner, during the time that he was performing work under said written contract.

The defendants, further answering, deny that the work on said ditch or on said reservoirs ever was completed, and deny that at the time of the alleged completion of the work on the said ditch, and at the time of the alleged acceptance of the same, that there was due and owing to complainant on his said contract, by the Springer Land Association and the individuals composing the same aforesaid, and by the Springer Land Association, a corporation aforesaid, a balance of money amounting to the sum of seventeen thousand and six hundred and thirty-four dollars and twenty-seven cents, for work done under the contract; and also, the further sum of three hundred and ninety dollars, for extra excavating and hauling, ordered by the engineer in charge of the said work, and deny that said amount was allowed by said engineer in pursuance of the provisions of the said contract; and deny that any extra excavating or hauling was ordered by said engineer or allowed for by him or performed by the complainant; and deny that there is due and owing to the said complainant on his said contract, by the Springer Land Association and the individuals composing the same aforesaid, and by the Springer Land Association, a corporation aforesaid, or by either of said corporation or said association or said individuals, at the commencement of this action, any sum whatever, for or on account of work done by complainant under said written contract, or
18 for or on account of extra work done by him on said ditches or reservoirs.

These defendants, further answering, deny that there is justly due to the complainant for work done under said contract, or for extra excavating and hauling, any sum whatever, or that any sum on such account was due to him at the commencement of this action, but admit that the Springer Land Association and the individuals composing the same above named, as well as the Springer

Land Association corporation as aforesaid, have refused, and still do refuse to pay the complainant any sum whatever over and above what he has already been paid for or on account of any work alleged to have been done by him under said contract.

The defendants further aver as to extra work sued for, that no extra work was ever done by the plaintiff on said work, reservoirs, ditches or embankments, under any written order from the engineer in charge of said work, and that no such extra work was ever done under any written order bearing an endorsement or statement of any character of the agreed price for such extra work; and further avers that neither the complainant and the defendant, or any of the defendants, or any of its agents or employees or the engineer, mutually agreed upon to superintend said work, ever agreed together upon the performance of such extra work or made any written order providing for such extra work, containing an endorsement or statement of the agreed price for the same as required by specification of the alleged written contract attached by the complainant to his bill of complaint as an exhibit thereto.

These defendants, further answering, aver that the Springer Land Association, a corporation, ought not to be bound or liable for, nor should any of these defendants, any estimate made by the engineer placed in charge of the said work referred to in the bill of complaint under the contract attached thereto, because they aver that said engineer, in making such estimates, was either grossly negligent and inattentive to his duties as such engineer, relating to such estimate, so that he greatly overestimated the work performed by the complainant for which such estimates were made, by mistake or inattention, making the same much greater than the work done for which such estimates were given; or such engineer was induced or procured to overestimate such work, by being in some way, to these defendants unknown, fraudulently misled, imposed upon and overreached by the complainant, or his agents, employees or confederates, and thereby caused to make overestimates in the interest of the complainant, all of which was procured by complainant by the means aforesaid, to enable him, upon and by means of such overestimates, to collect and to procure from the defendants for such work, from time to time, and particularly as to the last estimate, a sum of money largely in excess of anything earned by com-
19 plainant, or due to him, so they aver that by the means aforesaid the said complainant has already procured from and been paid by said Springer Land Association corporation, a sum of money in the aggregate more than is due or coming to him for and on account of the work and labor in the bill of complaint mentioned.

These defendants further aver, that the right to audit and determine the amount to be paid by the said Springer Land Association corporation, on estimates rendered by the engineer rested entirely with the said Springer Land Association, and that said association was not bound to pay overestimates procured as aforesaid, and by reason of such overpayment so procured said association refuses to audit or pay any further estimates.

The defendants, further answering, aver that they are not, nor are any of them, liable to pay, or legally bound, for any final estimate made by the said engineer in charge of said work for the additional cause, to wit, that there never has been by the complainant made to these defendants, or any of them, or to the said Springer Land Association by the complainant, any satisfactory showing, or any showing at all, that the work is free from all danger from liens or claims of any kind, on account of indebtedness incurred by the complainants, in carrying on said work, as required by specification 15 of the contract attached to the bill of complaint, nor are these defendants, nor any of them, either indebted or are liable to pay complainant, because they aver that persons claiming to be subcontractors, performing work and furnishing material for said ditches, embankments and reservoirs under the complainant, filed claims for liens on said real estate in the office of the probate clerk of the county of Colfax, including therein all the property described in the bill of complaint, claiming such liens against the complainant and upon said property for work and labor so done, and claiming large amounts, to wit, in the aggregate, ten thousand dollars, to be due in the aggregate, and owing to such claimants from the complainant, and claiming that he has failed to pay such indebtedness, or to liquidate the same, which said claims for liens stand of record today as clouds and apparent incumbrances upon the property described in the bill of complaint, and did so exist at the commencement of this action; and many of said lien claimants began proceedings in the district court for the fourth judicial district, sitting in the county of Colfax, to enforce such claims for lien against the complainant and these defendants for the foreclosure and enforcement of such claims for liens, asking to have the same declared to be a lien on the property described in the bill of complaint, and further asking that said court decree a sale of said property to make such claims for liens, many of which suits were pending at the commencement of this action.

These defendants further aver that the complainant wholly neglected to settle such alleged liens, or to take any steps to remove the same from off said property described in the bill of complaint, so as to leave such property free from the danger of sale, resulting from such actions, and neglected and refused to defend against them, or to institute proceedings in any way to have closing of lien released, removed or decreed to be of no effect; and said defendant, The Springer Land Association, corporation, was in consequence of such negligence and omissions on the part of the complainant, and his failure to comply with such specification No. 15, compelled in said actions and at a great loss of time to such association in convenience and expense for solicitors' fees, costs and otherwise, to wit: in the sum of five thousand dollars, to defendant in said actions, all of which complainant under his said contract was in duty bound to do, before calling upon the Springer Land Association for payment under said contract, and before said association under said contract, became liable to pay any final estimate thereunder; they aver that it is the duty of said complainant to

remove all of said claims for lien, clouds and incumbrances on the said property, before proceeding farther with his said action and before the defendants or any of them, or the said property described in the bill of complaint can be held liable for any work done by complainant, under said contract.

These defendants further aver, that said complainant under the said fifteenth specification was bound to settle up with all of his subcontractors on said work, and with persons furnishing him with materials connected therewith, and bound to place, said work ditches, reservoirs, dams and real estate in such condition, as to render the same free from all danger, from liens or claims arising from the failure of the complainant to liquidate, settle and adjust for such work done and materials furnished. That complainant instead of performing his contract in that particular, abandoned the work and country, while claims were pending against him and against the property described in the bill of complaint for such labor done, and materials furnished, and allowed and permitted the title to such property to become greatly clouded, covered and incumbered, and claims for liens for such work and material against said complainant, to be filed under the laws of New Mexico, and particularly omitted and neglected to settle with one Henry Dargel, a subcontractor; that complainant entered into a contract with said Dargel, to perform work, labor and furnish material on or about said work to enable the said complainant to perform his contract and although such Dargel did a large amount of work thereon, the said complainant wholly refused to settle with said Dargel, but so *demanded* himself with reference to the work and labor so performed by the said Dargel, that he, the
21 said Dargel, filed with the probate clerk of the county of Colfax, and Territory of New Mexico, his claim for lien on said real estate, ditches, dams and reservoirs as a subcontractor, under said Ford, claiming such lien by virtue of the lien laws of the Territory of New Mexico, and said Ford refused and neglected to make any settlement or adjustment of said dam for lien in particular, or to bring any action to remove the incumbrance thereof, but permitted the said Dargel to bring an action to foreclose said lien in the said district court, and said Dargel did bring such action, and was at the commencement of this action, prosecuting such suit against the said Patrick P. Ford, and these defendants, and was claiming that there was due to him from the said Ford over three thousand dollars for work and labor done by him and materials furnished, as such subcontractor, all of which said Ford has continuously from the time of the filing of the said lien to the present time well known, the said complainant being a party defendant in said action. The said complainant has taken no steps whatever to free the said property from said claim, but has abandoned the said property and has not sought to protect it from said claim of lien, and thereby the defendant, The Springer Land Association, has been compelled to defend and is now defending against said action, and was so defending at the commencement of this suit and so the defendant avers that the complainant has not kept and performed his said contract, and is not entitled to have and receive anything

whatever on account of said work, or of the last estimate therefor, all other and former estimates having long since been paid.

These defendants further answering deny that the complainant is entitled to the relief or any part thereof, in said bill of complaint demanded, and pray the same advantage of this answer as if they had pleaded or demurred to the said bill of complaint, and pray to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

LONG, FORT & BUNKER,
Solicitors for Defendants.

And afterwards, to wit, on January 3rd, 1891, there was filed in said clerk's office, Exhibit "A," to the answer of the defendants, which said Exhibit "A" is in words and figures as follows, to wit:

EXHIBIT "A."

This agreement, made on this, the first day of May, A. D. 1888, by and between Harry Whigham, of Raton, New Mexico, as receiver of the Maxwell Land Grant Company, and approved by M. P. Pells, as agent of the income bondholders of the Maxwell Land Grant Company, party of the first part, and C. C. Strawn, of Pontiac,
22 Ill.; W. L. Johnson, of Chicago, Ill.; M. W. Mills, of Springer, N. M., and such other persons as they may associate with them, which persons will hereafter, by a separate writing, make themselves parties to this contract, parties of the second part:

Witnesseth, that, whereas, on the 18th day of August, A. D. 1885, by the order of the district court of the first (now the fourth) judicial district of the Territory of New Mexico, sitting within and for the county of Colfax, made and entered in a certain action therein pending wherein Thomas J. Wright and others were complainants, it was, among other things, ordered and decreed that he, the said Harry Whigham, be appointed to receive the rents and profits of the real estate, freehold and leasehold, and to collect and get in the personal estate of the said Maxwell Land Grant Company, a certified copy of which order is hereto attached and made part hereof, as Exhibit "A;" and

Whereas, by the further order of said court, made and entered on the 31st day of May, A. D. 1887, it was further ordered, adjudged and decreed that the said Harry Whigham, as such receiver, be authorized to sell and execute deeds for the lands within the outboundaries of the tract of land known as the Beaubien & Miranda, or Maxwell land grant, situated in the Territory of New Mexico and the State of Colorado; provided, however, that such deeds, before being delivered, shall be approved by the said M. P. Pells, as agent of the income bondholders of the said Maxwell Land Grant Company, as aforesaid, and that such deeds shall receive the approval of the said district court, a certified copy of which last order is hereto attached and made part hereof, as Exhibit "B;" and

Whereas, the contract heretofore made between the said Harry Whigham, receiver, and the said M. W. Mills, of date December 1st,

1887, of and concerning about seventy thousand (70,000) acres of the land hereinafter mentioned, has been mutually surrendered and cancelled by the parties thereto, and is by these presents cancelled, set aside and abrogated; and

Whereas, the party of the first part, with a view of selling at an enhanced value certain lands, amounting to about twenty-two thousand (22,000) acres, lying east of the Ponil river, north of the Cimarron river, and west of the right of way of the New Mexico & Southern Pacific Railroad Company, and within the outboundaries of that portion of said land grant situate in the county of Colfax, in the Territory of New Mexico, and being duly authorized in the premises by said orders of said court, has projected a plan for the construction of large irrigating canals, ditches and reservoirs attached thereto, which said canals, ditches, reservoirs, are estimated,
23 in the judgment of experts, well qualified to make such estimates, who have carefully surveyed the same, to cost about fifty-six thousand dollars ($56,000.00); and

Whereas, the party of the first part is also desirous of and is duly authorized in the premises by said orders of said court, to dispose of other lands within that part of said land grant, within the Territory of New Mexico, lying in a body, and containing in all one hundred and ten thousand (110,000) acres, more or less, of unsold lands, bounded on the north by the line dividing townships numbers twenty-eight (28) north and twenty-nine (29) north, ranges numbers twenty-three (23) east and twenty-four (24) east, United States surveys, and bounded on the east by the east line of said land grant, and bounded on the south by the south line of said land grant, and bounded on the west by the line of the right of way of the New Mexico & Southern Pacific Railroad Company, (commonly called the Atchison, Topeka & Santa Fe Railroad Company); and

Whereas, the parties of the second part are desirous of engaging in the enterprise of developing and selling all the lands above described, and for that purpose have viewed the lands and investigated the circumstances and conditions appertaining to the same:

Now therefore, in consideration of the surrender and cancellation of the said Mills contract, as aforesaid, and the further consideration of the obligations hereinafter mentioned, to be kept and performed by the said parties of the second part, the said party of the first part agrees to and with the said parties of the second part, that he will reserve, set apart and hold from sale, except as hereinafter provided, said twenty-two thousand (22,000) acres of land under the ditch system hereinafter provided: Provided, however, that the said party of the first part hereby reserves to the said Maxwell Land Grant Company and its successors and assigns, out of the said tract of twenty-two thousand (22,000) acres, two thousand (2,000) acres under said ditch system, with a perpetual right to the use of the water of said ditches for the same without compensation, but otherwise upon the same terms and conditions as made to purchasers herein to be first selected in sections numbers twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty-three (33), and thirty-four (34), in township number twenty-six (26) north, range number

twenty-one (21) east, of the second guide meridian east in the county of Colfax and Territory of New Mexico, for the sole benefit of the Maxwell Land Grant Company, without compensation; and, provided, further, that the parties of the second part shall within thirty (30) days after such ditch system has been finally located and the detail plans and specifications thereof have been completed
24 and submitted for the execution of the work, select lands under the said ditch system until they have selected the full amount of twenty thousand (20,000) acres from any lands under said ditch system, whether the same be east or west of the said right of way of the New Mexico & Southern Pacific Railroad Company, for their disposal, as herein provided:

And, the party of the first part in further consideration of the covenants herein to be kept and performed by the parties of the second part, does also agree to grant and convey by a proper instrument in writing, to a trustee to be appointed by the parties hereto, who shall hold the franchise for the joint benefit of both parties to this agreement, and issue certificates of ditch ownership as hereinafter provided, the right to take all the water which may flow in the Cimarron river at and below the mouth of the Ponil river, excepting so much thereof as may be held to legally belong to the vested right of any person or persons having lands on the stream below, and without prejudice to the water rights or privileges now in use of any person or persons holding or claiming, rightfully or wrongfully, as the case may be, lands of the said Maxwell Land Grant Company or its predecessors, and the grantees of said persons on said Cimarron and Ponil rivers and their tributaries, above the mouth of the said Ponil river:

And, in consideration of the herein-described valuable rights and privileges granted by the party of the first part, the parties of the second part hereby agree to provide without delay, the sum of sixty thousand dollars, ($60,000) or so much thereof as may be necessary, and to use the same in constructing in a good and workmanlike manner, the system of canals, ditches and reservoirs, upon the lands indicated by Exhibits "C" and "E" hereafter made a part hereof, and according to the detail plans and specifications, to be hereafter prepared by E. H. Kellogg, C. E., who is hereby mutually chosen and appointed by the parties of the first and second parts, as the engineer to superintend and approve the construction of said system of canals, ditches and reservoirs, and which detail plans and specifications shall be in harmony with, and not exceed the plans indicated in the transcript from the report and sectional plat of said E. H. Kellogg, hereto attached and made part hereof as Exhibits "C" and "E." The work of constructing said canals, ditches and reservoirs to be at the sole and exclusive cost and expense of the parties of the second part, and the same to be commenced on or before the 15th day of July, A. D. 1888, and completed within six (6) months from that date, or as soon thereafter as the same can be well, properly and economically done when vigorously prosecuted, considering the nature of the work and the character of the sea-
25 son; and, provided, the construction of the said canals, ditches

and reservoirs shall not cost to exceed said sum of sixty thousand dollars ($60,000):

And, the parties of the second part, further agree that they will at their own and sole cost and expense, use their best efforts to sell all of said twenty thousand (20,000) acres of land coming under said canals, ditches and reservoirs to purchasers for *bona fide* cultivation, settlement or occupancy, only in alternate sections, so far as it may be practicable and expedient so to do, and that all the same shall be sold at the earliest time hereafter possible, in accordance with the terms of this agreement, by the parties of the second part, for not less than one-fifth (1/5) in cash in hand at time *or* sale, the balance due to be paid in not exceeding ten (10) annual installments, each evidenced by two (2) promissory notes for the deferred payments, bearing seven (7) per cent. interest annually, each note to be for one-half (1/2) of any such annual deferred payment, and each note to be secured by a trust deed containing full, adequate and ample powers of sale in case — default in payment by the purchaser or purchasers, of any installment of principal or interest running to a trustee, to be mutually agreed upon and appointed hereafter, as the mutual trustee of the parties of the first and second parts, or the holder or holders of such promissory notes so secured as aforesaid, and a sufficient deed in fee-simple with full covenants of warranty of the premises sold, free and clear of all liens and incumbrances, except as to the reservations herein specified, and delivered to the purchaser or purchasers by the party of the first part, upon receipt by said trustee of *of* the said cash payment, and the execution and delivery by the purchaser or purchasers of the notes evidencing the deferred payments, and the trust deed securing the payment of the same with interest as aforesaid, and each cash payment and the said notes evidencing the said annual and deferred payments to be immediately distributed and delivered one-half (1/2) of the cash payment, and one (1) of the notes, evidencing one-half (1/2) of each annual deferred payment, to the party of the first part, the other one-half (1/2) of the cash payment, and the other of the notes evidencing one-half (1/2) of each annual payment to the parties of the second part to this contract, at the time of the receiving of said cash payments, and the taking of the said notes secured as aforesaid; the objects and purposes of the parties to this contract being, that, the parties of the first and second parts, shall each share equally in the proceeds of the sales of said lands, under said ditch system, and that the equal share of each party shall be received by each party at the time of the transaction as aforesaid.

And it is also mutually agreed between the parties hereto that as each annual payment becomes due, each party, or in
26 case of the assignment of the notes so due and unpaid, then the holder of such note or notes shall have the right to demand and receive payment of the same, and in case of default in such payment to require the trustee to proceed to collect any such defaulted note or notes with the costs, attorneys' fees and damages named in said trust deed, by foreclosure of such trust deed and enforcement of the powers of sale therein contained for the use

and benefit of the holder or holders of any such defaulted note or notes, and when collected said trustee shall immediately pay the amount of collection to the holder or holders of such defaulted note or notes, less such portion of said costs, attorneys' fees and damages as may be stipulated between such holder or holders of such defaulted note or notes and such trustee, shall be retained by such trustee as his compensation in the premises;

And, it is further mutually agreed between the parties hereto, that none of the lands under said irrigating ditch system shall be sold for less than the average price of fifteen dollars ($15.00) per acre, including the perpetual water privilege from said ditch system; provided, that if after such ditch system shall have been completed and the water turned in and the extent of the utility of the same demonstrated or ascertained, it shall be found that said land, notwithstanding the use of vigorous efforts upon the part of the parties of the second part will not sell at said average price of fifteen dollars per acre, then the parties to this contract shall mutually fix upon a less price for which said lands may and will sell in the market, and the party of the first part in such event having the preference to purchase at such mutually reduced price;

And, it is further mutually agreed between the parties hereto, that the party of the first part and the parties of the second part shall each pay one-half (½) of all the taxes lawfully assessed on the total valuation of all the unsold lands remaining from time to time, and that each party shall also pay one-half (½) of all the taxes that may be lawfully assessed upon any interest they may have remaining from time to time in said irrigating plant, including canals, ditches and reservoirs, if it shall be found that the same is lawfully assessable for taxation as independent and separate from the realty enhanced in value by the same;

And, it is further mutually agreed between the parties hereto, that the following perpetual rights and reservations, without compensation as to any of them, be and forever remain to and with the said The Maxwell Land Grant Company, which perpetual rights and reservations shall be contained in all deeds to all purchasers as covenants upon such purchasers and their grantees, running with the land:

27 First. The use of sufficient water from all streams, canals, ditches and reservoirs, for town, city and manufacturing purposes, excepting water power:

Second. Sufficient water for cattle, horses and other stock, with necessary access and right of way thereto along the said streams, canals, ditches and reservoirs and all of them, such access and right of way to be, as soon as may be hereafter designated, with the view to as little inconvenience as possible to actual cultivators, settlers and occupants. The parties of the second part, or the grantees of the said land under this contract, to receive notice of such access and right of way from the party of the first part:

Third. The exemption of the said The Maxwell Land Grant Company from liability to damages by the cattle, horses or other

stock of said company to crops upon any and all of the aforesaid lands:

Fourth. All the cement-rock rights heretofore granted to the Springer Cement Company on the lands aforesaid:

Fifth. Twenty (20) feet on each side of each section line east and west and north and south, through said lands, to be dedicated to the public as right of way for public highways; also, twenty (20) feet on the lower side of all canals and ditches and around all reservoirs herein mentioned, to be used by superintendents and workmen and others in repairing said canals, ditches and reservoirs, and in superintending the same. Also, one hundred and twenty-five (125) feet on either side of the section line east of the township line between ranges numbers twenty-one (21) and twenty-two (22), to be used by the Maxwell Land Grant Company as a cattleway; also, one hundred and twenty-five (125) feet of land on either side of the section line two (2) miles east of the township line dividing ranges numbers twenty (20) and twenty-one (21) east, to be used by the said company for the same purpose. Said cattleways run north and south, and are to run through any of the lands selected under this contract which may be located on said section lines:

And, it is further mutually agreed between the parties hereto, that the following perpetual rights and reservations not to be incorporated in deeds to purchasers under this contract shall be and forever remain to and with the said Maxwell Land Grant Company, without compensation from said company:

The right to graze on any and all the lands remaining unsold on both of the tracts referred to herein, viz., the tracts including one hundred and ten thousand (110,000) acres and the twenty thousand (20,000) acre tract:

27½ It being estimated that the capacity of the said irrigating system, ditching and reservoirs may ultimately be equal to serve thirty thousand (30,000) acres, it is hereby mutually agreed that the parties of the second part shall on or before the 1st day of October, A. D. 1889, have the option to select seven thousand (7,000) acres more of land from the adjacent unsold lands of the Maxwell Land Grant Company, suitable for irrigation, and if the parties of the second part shall exercise such option, then the party of the first part shall reserve such selected lands for the use of the parties of the second part upon the same terms as they take the lands under the said ditch system. Provided, if at the expiration of five (5) years from the date hereof, the parties of the second part shall elect to expend an additional sum of twenty-one thousand dollars ($21,000) in increasing the supply of water service of said system, by the building of storage reservoirs on the upper courses of the streams, or by other methods equally serviceable and mutually approved by the parties hereto, then said parties of the second part shall have said seven thousand (7,000) acres of land, and otherwise not:

And, it is further mutually agreed, that every purchaser of land under said ditch system, shall have conveyed to him by proper certificate of ownership, a perpetual right running with the land pur-

chased in the canals, ditches and reservoirs of said system in such proportion as thirty thousand (30,000) acres bears to the whole water supply, (it being estimated that thirty thousand (30,000) acres may be the ultimate capacity of said ditch system), that is, if such purchasers should buy one hundred acres of land he would be entitled to a one three-hundredth ($\frac{1}{300}$) part of all the water, and a like interest in all the plant, of said system, except that the ice which may form upon said reservoirs, is hereby forever reserved, to the parties of the first and second part-, in equal shares, which mutual reservation shall also be incorporated in the deeds to all the purchasers:

And, it is further mutually agreed, that all purchasers of land under said ditch system, be further required to pay in the proportion specified in the last preceding paragraph all repairs on said canals, ditches and reservoirs as the same may be from time to time required for the perfect maint*ai*nance and the preservation of such canals, ditches and reservoirs, and also to pay all taxes, in the same proportion, that may be lawfully assessed upon the said canals, ditches and reservoirs, and the right of way and the franchise thereof, if in law any such taxable franchise shall be found to exist:

And, it is further agreed, between the parties hereto, that such purchasers shall not receive their certificate, or be entitled to vote their interest in said ditch system, until their land shall be fully paid for.

28 And, it is further agreed between the parties hereto, that if the construction of the canals, ditches and reservoirs mentioned, should at the completion be found to cost less than sixty thousand dollars ($60,000), and that after such complete construction it should be satisfactorily shown that these canals, ditches and reservoirs were of insufficient capacity to give water service for twenty-two thousand (22,000) acres, within three (3) years after such complete construction, then the parties of the second part, shall invest such unused part of the said sixty thousand dollars ($60,000), in constructing such further ditches, reservoirs or reinforcements to the same as may be necessary to bring the whole of the twenty-two thousand (22,000) acres under sufficient irrigation:

(5.) As to the one hundred and ten thousand (110,000) acres, more or less, of unsold lands embraced within the boundaries hereinbefore described, in consideration of the agreements and obligations of the parties of the second part hereinafter contained, it is covenanted and agreed on the part of the party of the first part, that he will set over and deliver, and he does hereby set over and deliver, to the parties of the second part, the said one hundred and ten thousand (110,000) acres, more or less, except such part thereof, as may come under the said ditch system, and be selected by the parties of the second part, as provided in the first section of this contract, for the sale upon the terms and conditions hereinafter stated, and in consideration of the covenants and agreements contained in the last preceding paragraph, and hereinafter contained, on the part of the party of the first part, the parties of the second part hereby covenant and agree that they will use their best endeavors to sell and dispose of said one hundred and ten thousand (110,000)

acres, more or less of land, less the exception therefrom aforesaid, and that they will immediately upon the execution of this contract, set about, and undertake the sale and disposal of said last-mentioned lands, and that hereafter they will continue to contribute their best efforts, skill and ability so to do, until the whole of said lands are entirely sold and disposed of, as best may be under the following terms, conditions and restrictions, that is to say:

The average grade price per acre of all of the lands south of the north line, of township number twenty-six (26) running east and west, through said one hundred and ten thousand (110,000) acre tract, shall not be less than two dollars and fifty cents ($2.50) per acre, and the average grade price per acre of all the lands north of said north line of said township, shall not be less than three dollars ($3.00) per acre, and out of the proceeds of all said sales, the party of the first part, shall at the time of each sale receive the average grade price of the particular tract out of which the particular sale is made, and one half (½) of the gross sum realized
29 above these average grade prices, and the parties of the second part shall also at the time of each sale, receive and have to and for their own exclusive use and benefit the other one-half (½) part of said gross sum above said average grade prices realized from such sales; and if said tracts of lands shall be subdivided and sold in small tracts (as it is understood will be done so far as may be practicable and consistent with the objects of this contract), the prices per acre are to be so averaged and placed on the uplands and on the bottom lands of said two last-named tracts, severally, that the said party of the first part, will be enabled to realize the said average grade prices on said tracts, severally excepting such portion or portions thereof, as may be under said ditch system, and selected by the parties of the second part, under the first section of this contract; and if the better subdivisions of said tracts of land shall first be sold and disposed of, it shall be at prices sufficiently in advance of said several average grade prices, so as to insure the sale of the remaining and poorer subdivisions, or portions of said several tracts at a price that will realize to the party of the first part, said average grade prices severally: and the lands in said several tracts, shall be sold free and clear of all liens and incumbrances for cash in hand, or part cash and the balance in deferred payments, bearing interest at the rate of seven (7) per cent. per annum, by good and sufficient deeds in fee-simple with full covenants of warranty, and taking from the purchasers promissory notes for said deferred payments with interest at seven (7) per cent., and a trust deed with full powers of sale, securing such notes, the same in detail as is provided for as to the sale of the lands under the said ditch system mentioned in the first section of this contract; the deeds to such purchasers to be duly executed and delivered by the said party of the first part to the purchasers at the time of payment of the purchase price in cash, or in part cash, which said part cash however, shall never be less than one-fifth (⅕) of the whole of the purchase-money, and part notes secured by trust deeds as aforesaid, and the proceeds of such sales shall be distributed among and

delivered to the parties of the first and second parts both as to the cash payments and deferred notes in proportion to the interests of the parties hereto in each sale, that is, if one-fifth ($\frac{1}{5}$) part of the purchase-money be paid in cash, then one-fifth ($\frac{1}{5}$) of the average grade price of the tract out of which said sale shall be made, shall first be delivered out of said cash payment to the party of the first part, and the balance then be equally divided, and if the remainder be in ten (10) payments by note, one-tenth ($\frac{1}{10}$) of the remaining four-fifths ($\frac{4}{5}$) of said average grade price or premium sum and one-twentieth ($\frac{1}{20}$) of the remaining unpaid profits shall be put in each of the annual notes to be delivered to the party of the first part, and a series of annual notes shall be delivered to the parties of the second part, each note representing one-twentieth ($\frac{1}{20}$) part of the total of the unpaid profits: And it is hereby mutually agreed between the parties hereto that the person or persons who may be chosen as trustee or trustees under the provisions of this contract as to the lands under said ditch system, shall by virtue of such choosing and appointment be and act as the trustee or trustees for the trust deeds taken from the purchasers of the lands embraced in this section of this contract: And it is further mutually agreed between the parties hereto that the party of the first part shall pay all taxes that may be assessed upon all unsold portions of said tract of land, and that he will bear all necessary expenses of litigation in protecting the said tract of land from encroachment by trespass or by squatters, under whatever right they may claim, and in maintaining the purchaser or purchasers of the same or any part thereof, in full and peaceable possession and complete title of the same, so that possession and title can be given to the purchaser or purchasers free from any lien or incumbrances whatsoever: And the parties of the second part shall in no event become purchasers of said lands or any part thereof, directly or indirectly without the written consent of the party of the first part first had and obtained:

And it is further mutually agreed between the parties hereto, that the said parties of the second part shall bear all expenses of negotiating, disposing of and selling the said tracts of land and all portions thereof, including all expenses of subdividing in smaller tracts than one hundred and sixty (160) acres, of traveling, advertising, commissions of sub-agents making contracts, and all other expenses incident to the sale of said lands:

And it is mutually agreed between the parties hereto, that in the event that the proceeds of the sales of said lands do not exceed five (5) per cent. in excess of said average grade prices per acre upon a fair average market value of all the lands in said tracts severally, then the party of the first part shall pay such five per cent. to the parties of the second part, upon all sales made at the expiration of each and every three (3) months from the date of this contract and during the continuance thereof, as the total compensation of the parties of the second part in the premises:

And it is further agreed between the parties hereto, that if it shall at any time clearly appear that the lands being sold are of a higher

value than the average of the whole value of the lands, the party of the first part shall have the right to withhold from the share of the parties of the second part a sum proportionately equal to what the average value of the remaining unsold lands may be, less than the total average premium price of the particular tract, of said two tracts, in which the sales are made; and the parties of the second part further agree that they will prosecute the sale of said lands vigorously and complete, and conclude the sale of the entire
31 tract at as early a day as practicable under the terms and conditions and restrictions imposed, and that the one-seventh ($\frac{1}{7}$) of the whole body of land in the two (2) tracts, or thereabouts, shall be sold each year, but in no case shall more than one-quarter ($\frac{1}{4}$) of the whole of said two (2) tracts be sold in any one year, and the entire tract be sold and disposed of within six (6) years from the date of this contract, and no part shall be sold at a price less than the market price of these or surrounding lands:

And it is further understood and agreed that to enable the parties of the second part to more effectually carry out the terms, conditions and spirit of this contract, they are hereby duly made, constituted and appointed the agents of the party of the first part to do and perform, in accordance with the terms of this agreement, any and all acts necessary to be done and performed in the premises, in order to carry out the stipulations and agreements herein contained to the true intent, meaning and spirit hereof, hereby confirming any and all acts they may do or cause to be done in conformity with the agreements herein contained:

It is understood and agreed that all the stipulations, covenants and agreements, herein contained and required of the said party of the first part, shall extend to and be binding upon the said party of the first part in his respective official or representative capacity, as also that of M. P. Pells as agent of the income bondholders of the Maxwell Land Grant Company, who approves this instrument, and each of them as herein recited, and shall also include, bind, extend to and mean, as well the said Maxwell Land Grant Company, and as well also the income bondholders of the said Maxwell Land Grant Company, and the heirs, executors, and administrators, successors and assigns of each of them, as fully and completely as if they had been fully mentioned along with the said party of the first part each time hereinbefore:

And wherever, in this agreement, the parties of the second part are mentioned it shall be held as well to refer to and to bind and be for the benefit of each and every one of the said parties of the second part, their heirs, executors, administrators, successors or assigns, the same as though they had been in each and every case hereinbefore specifically stated, and wherever the Maxwell Land Grant Company is mentioned herein it shall include its successors and assigns.

In witness whereof the said party of the first part, and also the said parties of the second part have hereunto set their hands and seals on the day and year first above written.

32 And afterwards, to wit, on the third day of the regular March term, A. D. 1891, of the district court, within and for the county of Colfax, the same being the 18th day of March, the following, among other proceedings, were had, to wit:

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

It is ordered by the court that William E. Gortner, Esq., be and he hereby is appointed examiner in the above-entitled case,
33 to take the proofs and report the same to this court, with all convenient speed.

And afterwards, to wit, on the 8th day of the regular March term, A. D. 1891, of the district court, within and for the county of Colfax, the same being the 24th day of March, 1891, the following, among other proceedings, were had, to wit:

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

Now come the defendants in the above-entitled cause, by their attorneys, Messrs. Long, Fort & Bunker, and file their cross-bill, which said cross-bill is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District of the Territory of New Mexico, Sitting within and for the County of Colfax, March Term, A. D. 1891.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

To the Honorable James O'Brien, chief justice or the supreme court of the Territory of New Mexico and *ex officio* judge of the fourth judicial district of said Territory:

Your orators, The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, and The Springer Land Association, a corporation, respectfully represents unto your honor that heretofore, to wit, on the 30th day of June, A. D. 1890, the above-named complainant, Patrick P. Ford, filed in the fourth judicial district court, of the Territory of New Mexico, in chancery sitting, his bill of complaint, making parties thereto your orators, and also the Maxwell Land Grant Company, a corporation, Rudolph V. Martensen and Charles Fairchild, Nicholas Thuron, Samuel L. Parish, Martinus P. Pelts, Henry W. Porter and Frank Springer,

trustees of the said Maxwell Land Grant Company, acting under the name, style and title of the board of trustees of the *the* Maxwell Land Grant Company, averring, substantially, in said bill of complaint, that said Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames and William A. Comstock, on to wit: the 20th day of October, 1888, entered into a certain contract in writing, and that the Springer Land Association was an unincorporated body at that time; and alleging further, that under and by virtue of the said written contract, a copy of
34 which purports to be attached to the said bill of complaint, that the complainant, Patrick P. Ford, contracted to furnish all necessary tools and labor and to perform all the work of grading required in the construction of the Cimarron ditch and its accessories, and alleging further that the said ditch is called "the Cimarron ditch," and is situate in Colfax county, Territory of New Mexico, and begins at a point where the Ponil and Cimarron rivers meet to form the Cimarron, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax, Territory of New Mexico, being in length about twenty-six miles; that the said ditch has appurten-t thereto, along its entire length, land, as passageway, about sixty feet in width; has also lateral ditches and reservoirs, and the land covered thereby, and also appurten-t to said ditch twenty-two thousand acres of land in said county, and under said ditch, and to be irrigated thereby, and described as follows, to wit: Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east; and sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east.

All of which ditch laterals, reservoirs and lands, as aforesaid, the said bill of complaint alleges are platted and laid out on the plan which is made a part of said bill.

The said Patrick P. Ford, in his said bill of complaint, further avers that he began the said work on the said ditch, on or before the 1st day of November, 1888, and prosecuted the same continuously until the 21st day of June, 1889, and alleges that at that last date he completed the said work, in substantial compliance with the said written contract.

He further avers that in the performance of the said work he was an original contractor, and that within ninety days after the completion of the same, as alleged by him, that he filed for record with the county recorder of Colfax county, in said Territory, a claim containing a statement of his demands, together with a description of the property to be charged with a lien, in accordance with the terms of an act of the legislature in such cases made and provided, and avers that said claim was verified by the oath of the said Patrick P. Ford, and filed for record, July 3rd, 1889, and recorded in Book "H" of the said recorder's office, pages 1 to 8. The said Patrick P. Ford further avers in said bill, that about the time of the

alleged commencement of the said work, that the Springer Land Association transferred unto the Springer Land Association, a corporation, duly organized under the laws of the Territory of
35 New Mexico, all their right, title and interest in and to the said work and to the ditch and land and accessories thereto.

That said Patrick P. Ford, in his bill of complaint further avers that the Springer Land Association, a corporation, became obligated to pay for all the work done and performed by said Patrick P. Ford, as alleged and described in his said bill of complaint, on and about said work; and further alleges, that the said Springer Land Association have and claim to have an interest in the land upon which said reservoirs and ditches are located, and upon the ditches and reservoirs, and upon the lands adjacent thereto, as herein first above described; and alleges and claims that the sum of seventeen thousand six hundred and thirty-four dollars and twenty-seven cents, was at the commencement of the said action due from the said Springer Land Association to the said Patrick P. Ford for work done under said contract, and for the further sum of three hundred and ninety dollars for extra excavating and hauling, alleged in said bill to have been ordered by the engineer in charge of said work, and to have been allowed by him in pursuance of the provisions of the said contract.

That the said Patrick P. Ford, in his said bill of complaint so filed as before alleged, further claims that the whole of the said sum is due from the said Springer Land Association, and claims that the said ditches, reservoirs and real estate hereinbefore described, are subject to a lien in their favor, for the whole of the said amount so alleged by him to be due, and claims and seeks to establish by such action that he holds a lien as original contractor, upon the whole of said reservoir and ditch system, and upon said real estate for said sum, and is seeking to prosecute his said action to final judgment and decree, and to procure a decree of this court establishing such claim as a lien, and decreeing a sale of the said ditch and reservoir system and real estate to make the money so by him alleged to be due.

Your orators further aver that the said Patrick P. Ford claims, by his speeches and declarations, gives out to the world and asserts openly, notoriously and publicly, that the paper so alleged by him to be filed is a lien upon all of said property, and that he intends to sell the same to make the said alleged lien, and has so given out and declared ever since he filed his said claim of lien.

Your orators further aver, that heretofore on, to wit, the 1st day of May, A. D. 1888, the Maxwell Land Grant Company was the owner of, and in possession of, all the real estate in the said bill of complaint so filed by the said Patrick P. Ford described. That said Maxwell Land Grant Company, at said last-mentioned date, acting therein by Harry Whigham, then receiver of the said Max-
36 well Land Grant Company, and M. P. Pells, then agent of the income bondholders of said company, made and executed a written contract with C. C. Strawn, W. L. Johnson, M. W. Mills, and such persons as they might associate with them, which said

contract is attached to this cross-complaint as a part thereof, and marked Exhibit "A." That said written contract contemplated and provided for the construction of the reservoir and ditch system referred to in the contract subsequently entered into by the said Springer Land Association and the said Patrick P. Ford, the same being the system referred to in the bill of complaint of said Patrick P. Ford.

Your orators further aver that after the making of the said written contract with the said Maxwell Land Grant Company, that for a good and valuable consideration paid therefor, your orators, The Springer Land Association, a corporation, became the owner of said contract, and succeeded to all the rights of the parties of the second part in said contract mentioned, and entitled to all the privileges, rights, benefits and profits in said contract provided for and contemplated. But the said Springer Land Association, corporation, succeeded to such rights for the use and benefit of said Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewkesbury, Frederick J. Eames and William A. Comstock, who all have a pecuniary interest, that said contract with said Maxwell Land Grant Company shall be carried out and performed, and also an interest in said contract with said Patrick P. Ford, and in the reservoir and ditch system in said contract mentioned. The parties to said contract and the terms thereof will more fully appear by reference to the said Exhibit "A," to which your orators pray leave to refer for more specific statement, that by virtue of said written contract the said Springer Land Association became entitled to construct large water reservoirs and maintain dams, embankments and ditches upon lands before that time owned by the said Maxwell Land Grant Company, and became the owner of certain rights and interests in the said real estate, as shown by said contract, and acquired the right to contract, sell and convey such lands upon completion and construction of such ditches, dams and reservoirs as in said contract contemplated. That it was contemplated by said contract, and the parties to the contract and your orators, and your orators intended, to construct large water reservoirs, dams and ditches, so as to bring certain large quantities of real estate on said Maxwell land grant provided for in said Exhibit "A," and therein mentioned under irrigation, to wit, thirty thousand acres of land. That the construction of said ditches and reservoirs was intended to and would have largely enhanced the value of such lands. That in pursuance of said contract with the said Maxwell Land Grant Company, and for the purpose of increasing the value of the land aforesaid, and to make the same quickly
37 salable, the said Springer Land Association, after it succeeded to such rights in said written contract, determined to construct upon said lands, such system of reservoirs, dams and ditches, and to maintain the same, and entered into a contract with the complainant in the said bill of complaint, who is made a defendant to this cross-bill, whereby the said complainant, Patrick P. Ford, agrees to perform all the work of grading required in the construction of the Cimarron ditch and its accessories, being the reservoirs,

dams and ditches aforesaid, and to furnish all necessary tools and labor, and perform all work of every kind and character in and about said reservoirs, dams and ditches, in a thorough and workmanlike manner, and in full accordance with certain specifications attached to a written contract, entered into by and between the said Springer Land Association and the said Patrick P. Ford, a copy of which said written contract and specifications is attached to this cross-bill, and marked Exhibit "B," as a part of the cross-bill, and your orators ask leave to refer to the same for a more particular statement of said contract. That the said Patrick P. Ford signed said contract on the 26th day of October, 1888, and agreed to commence work upon said reservoir system within ten days after so signing the said contract, and to fully complete the said contract and construct said reservoirs and ditches on or before the 1st day of July, 1889; for such work said Springer Land Association, in said written contract, agreed to pay at the rate of eleven cents per cubic yard, without classification, at the times and in the manner as in said specifications set forth.

Your orators further aver that it was extremely important to them that said contract should be fully completed at the time named therein, and hereinbefore averred, and it was contracted by the parties that the time within which said contract was to be completed should be the essence of and the essential feature in said contract. It was further contracted and agreed in said writing that final payment of the amount ascertained to be due on the final estimate of the engineer referred to in said contract should be postponed, not due, and not be made by your orator until the said Patrick P. Ford had entirely relieved the said ditches, reservoirs and embankments from all liens and freed the same from all danger from liens and claims of every kind, through failure on his part to liquidate his just indebtedness as connected with said contract.

Your orators further aver, that the only reason which induced them to acquire the rights of and in said contract, with the Maxwell Land Grant Company attached to this cross-bill, and to undertake and enter into the contract with the said Patrick P. Ford, for the construction of the ditches, embankments and reservoirs contemplated and provided for in said Exhibit "B," was the
38 profits, which they would be able to make by the increased value of said lands, growing out of the construction and maintenance of said improvements, and in the sale of such lands and the division of the proceeds of sale, as provided for in said Exhibit "A;" that without such improvements the said lands were grazing lands only, and not profitable or valuable for agriculture, not salable or easily disposed of to purchasers; but by the construction of said system of reservoirs and ditches, and the maintenance of the same, a large part of said lands, to wit: thirty thousand acres would become irrigable lands, supplied with water from said system, profitable and valuable for agriculture, and would be in great demand and would sell readily, and yield to your orators large profits and income as the result of such sales, and it was for the purpose of placing said lands on the market and rapidly selling the same at

such advanced price and value that they acquired rights of, in and to said contract with the Maxwell Land Grant Company, and said contract with the said Patrick P. Ford, was entered into and said work undertaken; all of which facts were communicated to said Patrick P. Ford, and well known by him also from other sources before the said written contract marked "Exhibit B," was entered into and before the construction of the said work was commenced. It was fully made known to said Patrick P. Ford, before he entered into said contract, that if he failed to complete the same within the time agreed upon, that it would entail great loss and damage upon your orators, and it was further made known to him at the same time, that if he allowed subcontractors and persons performing labor for him, or furnishing materials for him, to file claims for liens upon said lands, either because of indebtedness existing against said Ford in favor of such persons for such work, labor and material, or because of any claim of such indebtedness, that it would so cloud and encumber the title to said lands as to destroy the sale thereof in market, and thereby greatly embarrass and damage your orators, and prevent the sales of real estate intended to be accomplished by means of said work. And so it was contracted by said Patrick P. Ford, as in the fifteenth specification of said contract set out, that he should not have and would not demand the last estimate made by the engineer, until he had entirely removed all liens and encumbrances and claims for liens arising out of work done by any subcontractor for him, or materials furnished by any subcontractor, and that final payment and payment of all final estimates should be deferred and postponed until he made said system and real estate wholly free from encumbrance.

Your orators further aver, that the said Patrick P. Ford failing to complete his said contract and failing to perform said work and labor as he had contracted to do, abandoned the same and left the country after he had performed a part of said contract, leaving a large number of persons who had performed work upon said reservoirs, ditches and systems, as subcontractors under said Ford, and who had furnished materials as such, claiming that said Patrick P. Ford, for such work and labor and material, was largely indebted to them therefor.

That said Patrick P. Ford wholly failed to settle with such persons, and to liquidate their claims, and by reason of such failure, claims of lien by a large number of persons performing labor and furnishing material in connection with said work, were filed in the office of the probate clerk of the county of Colfax, and Territory of New Mexico, in which said lands were situated, asserting and claiming liens upon said ditches, reservoirs and real estate, in the bill of complaint, by the said Patrick P. Ford described, and hereinbefore set out for and on account of such alleged work, labor and material, and thereby greatly encumbered and clouded the title of your orators to said real estate, and to its interest in the same, in such a way as to alarm purchasers, who otherwise would have purchased large tracts of said real estate, at sums largely in excess of the costs of the same to your orators, and thereby prevented your orators

from making such sale and the profits they would otherwise hav realized from the sale of such lands, if the said work had been com pleted by the said Patrick P. Ford, and he had kept said propert free from claims of lien and encumbrances, as he had contracte to do; and by reason of his said failure to perform said work, an to keep the said lands free from said liens and encumbrances, you orators have been damaged in a large sum, to wit, twenty thousan dollars.

Your orators further aver, that many of said persons so claimin to hold liens upon said ditches, reservoirs and real estate, com menced actions in the fourth judicial district court, sitting in an for the county of Colfax, to enforce against said real-estate claims o liens so filed, and in such actions asserted claims of lien against sai real estate, by reason of such alleged work and labor and materia in a large sum, to wit, the sum of seven thousand dollars. Althoug the said Patrick P. Ford was made a party to the said several action and fully knew of the same, he failed to enter appearance in any o said actions, or to settle with said parties, or liquidate the indebted ness alleged to be due, or to bring any action against said parties t remove such encumbrances and claimed liens from off such prop erty, and thereby to place the same in such condition as to enabl your orators to make sale thereof; but to the contrary, wholly neglected, failed and refused so to do, so that your orator was com pelled to appear in said actions and expend a great amount of time of the value, to wit, of one thousand dollars, and expend necessarily a large amount in solicitors' fees therein, to wit, the sum of on thousand dollars, in defending against said liens, and to pay 40 out and expend a large sum of money, to wit, the sum o twenty-five hundred dollars in settling, liquidating and ad justing a part of said claimed liens, so as to relieve said real estat from the cloud occasioned thereby, to that extent and in part.

Your orators further aver, that in all of said work, the sai Patrick P. Ford gave your orators no information or assistanc whatever. That actions are yet pending, founded on said allege liens, among others, an action by Henry Dargel, who claims a lie on said real estate by virtue of being a subcontractor under sai Ford; that in said action, he, the said Dargel, alleges that he entere into a contract with the said Patrick P. Ford to do certain excavat ing and embankment work, on the said irrigating system, and tha for certain of said work he was to receive eight cents per cubic yard and for certain other parts of said work he was to receive ten cent per cubic *yard*, and the said Henry Dargel further alleges in hi bill of complaint in said action, that he did work under his sai contract, for which he was to receive under the estimate of the engi neer in charge of said work, on the 10th day of January, 1889, fiv thousand nine hundred and thirty dollars, and alleges that of sai sum on the 28th day of February, 1890, there was due and unpai from said Patrick P. Ford, to him the sum of two thousand tw hundred and seventy-nine dollars; and for that amount and th interest thereon, the said Henry Dargel, by his said action to whic the said Patrick P. Ford is made a party defendant, is seeking t

have enforced and decreed a lien upon said ditches, reservoirs and real estate, and to have the same sold for said alleged and claimed liens. That the said Henry Dargel alleges in his said bill of complaint, that he did his said work strictly according to his said contract, and that the said Patrick P. Ford refused to pay him therefor, and in order to secure to himself the benefit of the lien laws of the said Territory of New Mexico, that he made, executed and recorded his notice of lien on the said irrigating system and real estate of your orators for said sum, and procured such notice to be recorded in the office of the probate clerk of said county of Colfax, on the 1st day of August, 1889, within sixty days after the completion of said work, and avers in his said bill of complaint in said action, that thereby a lien attached upon the said irrigating system and said real estate for the balance so claimed to be due.

Your orator-avers that the existence of the said action of the said Henry Dargel, in particular, and the assertion by him of his said claim of lien, has been, and now is, a great cloud and encumbrance upon the said property of your orator-, and has greatly prevented, and now does prevent, the sale of such real estate, and does yet so cloud and encumber said property.

Your orators further aver that they have no personal
41 knowledge of the state of accounts between the said Henry Darge- and the said Patrick P. Ford; and that they are informed and believe that it was the duty of the said Patrick P. Ford, under his said contract entered into with the said Springer Land Association, to make settlement with the said Henry Dargel, and make payment of such sum as might be found to be due to said Henry Dargel, and in the event of a disagreement of the said Patrick P. Ford and Henry Dargel, as to the amount so due, that it was the duty of the said Patrick P. Ford, by proper action, to remove said encumbrance and cloud upon your orators' real estate, before seeking or demanding payment for any final estimate made by the engineer in charge of said work.

And your orators further aver that all estimates made by the engineer in charge of said work prior to the final estimate, were long ago paid and discharged by the Springer Land Association, and that your orators should not be called upon or forced to pay such final estimate, for which alone the said Patrick P. Ford brought his said action, until the said claim of liens, clouds and encumbrances are wholly removed from your orators' said property.

Your orators further aver that the said Patrick P. Ford entered into some fraudulent arrangement or copartnership with Edwin H. Kellogg, the engineer in charge of said work, and by other false and fraudulent means unknown to your orators, and in collusion with the said Edwin H. Kellogg, as to the amount of work actually performed by said Patrick P. Ford, under said contract, and as to the completion of said work by him under said contract, and by such means procured the said Edwin H. Kellogg to make overestimates as to work done from time to time, and also a final estimate of the amount under said contract claimed to be due and unpaid to the said Patrick P. Ford, which said false and fraudulent estimate

showed an indebtedness from your orators, The Springer Land Association, on account of said work; but your orators are informed and believe and upon information charge the fact to be that the said Edwin H. Kellogg, at the time he made such final estimate, had entered into a conspiracy with said Ford to defraud and cheat your orators.

Your orators aver that by means of such false statements and representations, and other fraudulent acts unknown to your orators, the said Patrick P. Ford combined and confederated with the said Edwin H. Kellogg, and procured him to make a final estimate of said work, and to deliver the same to said Patrick P. Ford. That thereupon the said Ford, armed with such false and fraudulent estimate, demanded of the Springer Land Association payment of the same, well knowing that the same was unjust and not due to him, and upon refusal of said association to make such pay-
42 ment, he filed his said claim for lien hereinbefore referred to, and brought his said action to establish said lien, well knowing that the said Springer Land Association was in nowise indebted to him, and well knowing that the said Henry Dargel was making the claim hereinbefore referred to; and upen payment being refused, the said Patrick P. Ford filed his said bill of complaint heretofore mentioned for the sole and only purpose of forcing the Springer Land Association to make payment of the said estimate; the said bill of complaint, filed as hereinbefore averred, and the said action commenced as hereinbefore averred, by the said Patrick P. Ford, being for and to collect the said final estimate only.

Your orators further aver that at other and different times and by like fraudulent means, and by other fraudulent means unknown to your orators, the said Patrick P. Ford procured other and earlier estimates to be made by the said engineer, in excess of the amount due at the time of making the same, and that at the time of said final estimate so procured and made, the said Springer Land Association had greatly overpaid to said Patrick P. Ford for work done under said contract on said ditch system and reservoirs, so that at the time of the making of said final estimate nothing remained due and unpaid to the said Patrick P. Ford under said contract for or on account of any work by him done not included in said final estimate, or for or on account of any prior estimate.

Your orators further aver that the said Patrick P. Ford wholly failed to do and perform the work which he did do on said contract in a good and workmanlike manner, or cause the same to be so done, or in the manner provided for in said written contract, that he failed to dig the ditches of the depth, width or length in said contract called for; that he failed to make the various embankments of the height, depth, width or strength called for in said contract, and in no manner did the work as called for in said written contract, and never finished or completed the same at any time.

Your orators further aver that the said Springer Land Association, relying upon the said contract, and upon the completion of said work, expended a large amount of money in placing said land

upon the market for sale, in employing agents to make such sales, in advertising such ditch system, reservoirs and real estate, and in procuring special trains to run from the East to the town of Springer near which said lands are located, and procuring passage, transportation and railroad fares for persons desiring to look at and purchase said lands, to wit, the sum of five thousand dollars, upon the faith of said contract, and in the belief that the said work would be properly performed in the time named in said contract, and that all liens, claims of liens and encumbrances of every character would,

43 by said Patrick P. Ford, be removed from said ditch system and real estate, so that nothing would exist to embarrass said Springer Land Association in the sale and disposal of said lands.

Your orators further aver that by the means aforesaid large numbers of persons were induced to come long distances, from the East and elsewhere, to examine said lands, with a view to the purchase of different tracts of the same. And that the said Springer Land Association, through its agents, had actually sold to divers purchasers large tracts of said real estate, described in said bill of complaint, and other lands under said irrigating ditch, at a profit to them largely in advance of the original costs, to wit, at a net profit to the Springer Land Association of six thousand dollars, and said purchasers stood ready to pay the purchase price therefor at such profit, but were prevented and deterred from so doing by the failure of the said Patrick P. Ford to complete said ditch at the time specified in said contract and by his failure to keep said ditch system, reservoirs and real estate free from all claims of liens and unencumbered, as he had contracted in said written contract to do.

Your orators further aver, that large numbers of such persons, upon visiting said lands, at the town of Springer, or near there, were informed and became aware of the fact that the said liens of subcontractors and others were filed in said probate court, and were intended to be enforced against the said lands, and were thereby alarmed, caused and induced to refuse to carry out their contract of purchase, or to purchase said land, or any part thereof, so that the said Springer Land Association was in the manner aforesaid damaged in the sum of six thousand dollars.

Your orators further aver, that as a means whereby the more readily to make sale and disposal of the said real estate under said ditch system, that the said Springer Land Association, at great cost and expense to itself, to wit: ten thousand dollars, in the spring of 1890, established near the town of Springer, and adjacent to said reservoir system, a "model farm," of several hundred acres of land, under irrigation from said system, upon which they planted all kinds of grain and root crops, for the purpose of demonstrating to buyers of land that the soil of said real estate was first class in quality, and with a sufficient supply of water, that it would produce all kinds of crops abundantly, to the great profit of those who might buy such lands and cultivate the same. That said "model farm" produced abundantly, and said Springer Land Association kept a large number of employees whose sole duty it was to show pur-

chasers over the said land of the said irrigating system, and over said farm; that great numbers of persons were induced, thereby, to contract for the purchase of large tracts of said lands under said ditches, out of which purchases said Springer Land Association would and could have made large profit, but for the failure of the said party to purchase, by reason of the said liens and encumbrances. Such purchasers became alarmed, by reason of the existence of the said liens and claims and encumbrances, and refused, by reason thereof, to complete their contracts for purchase, alleging, as an excuse, that they feared complications and litigation by reason of such claimed liens and encumbrances on the said land.

44

Your orators further aver, that in the manner aforesaid, the said Springer Land Association lost the sale of divers and sundry tracts of land contracted to be sold at a price largely in excess of the original purchase price, and so lost such profit, and has been greatly damaged, in a sum largely in excess of the value of any work done or caused to be done by the said Patrick P. Ford, after the estimate next before the last was rendered, and in excess of the value of the work contained in the last estimate and in excess of the amount of said last estimate, so that by reason thereof, nothing is due or owing to the said Patrick P. Ford for or on account of the work done by him under said written contract.

Your orators further aver, that they are informed and believe that the fifteenth specification of the said written contract, by its terms, postpones payment of the final estimate, until after the said Patrick P. Ford shall have removed all liens, claims for liens and encumbrances of any character, from said real estate, reservoirs and ditch system, growing out of and connected with work done for him, or materials furnished for him, by subcontractors, or others, and that the said Patrick P. Ford having failed to keep said reservoir system and real estate free from such liens, claims of lien and encumbrances, brought his said action, filed his said bill of complaint prematurely and before such last estimate was due or payable.

Your orators further aver, that the said actions so instituted by said Patrick P. Ford, said claim so filed by him as a lien upon said ditch systems and reservoirs, and his public declarations to hold such lien and enforce the same, constitute a cloud on the right, title and interest of the Springer Land Association in and to said ditches, reservoirs and real estate, to the great damage of said Springer Land Association, and prevents the sale of the said real estate lying under said ditch system.

Your orators further aver, that said ditches and reservoirs, if the same had been by said Patrick P. Ford constructed according to the said contract plans and specifications, would have been amply sufficient to bring under irrigation said thirty thousand acres of land, and would have made said lands quickly salable at prices so much in advance of the original purchase price to your orators as to have made to your orators a large net profit. And that if the said Patrick P. Ford had so completed said contract and performed said work, and kept

45

said real estate, reservoir system and ditches free from liens, claimed liens and encumbrances, as he contracted to do, the purchasers of such land who had agreed with the said Springer Land Association to take conveyances of and pay for the same at prices affording said association a large profit, to wit: five thousand dollars, would have done so and were willing and ready to do so upon the performance of said work, and the removal of said liens, claims of liens and encumbrances; that the failure of the said Patrick P. Ford so to perform said contract, caused your orators to lose the benefit of contracts which your orators had already made with purchasers for the sale of such lands, and to lose the profits your orators could have made thereon, to their damage, five thousand dollars.

Your orators further aver upon information and belief, that they and the members of said The Springer Land Association, and the officers and stockholders of the Springer Land Association corporation, reside in the State of Illinois, and did so reside at the time when said contract- marked Exhibit "A" and Exhibit "B" were made and executed and entered into, and that both said contracts were made by agents of the said The Springer Land Association, unacquainted with Edwin H. Kellogg; that said Patrick P. Ford having knowledge that your orators were about to enter into said contract with the said Maxwell Land Grant Company, and intending and expecting to secure from the Springer Land Association, the construction of the reservoir and irrigating system contemplated in said contract Exhibit "A," in this cross-bill and expecting and intending to procure agents of the said The Springer Land Association, negotiating with the said Maxwell Land Grant Company in making said contract Exhibit "A," to agree to the selection of Edwin H. Kellogg as the engineer, as in said contract named, and either having already conspired and agreed with said Kellogg to unduly and wrongfully favor the said Patrick P. Ford, in the estimates thereafter to be made, and in the construction of the work on said reservoirs and ditches thereafter to be done, or intending so to conspire and agree with him, to enable the said Patrick P. Ford thereby to gain a wrongful and undue advantage over the said Springer Land Association in the execution of the work contemplated by said contract, and thereby procure from said association, pay to a large amount, for work never done, the said Patrick P. Ford conspired, confederated, arranged and agreed with certain persons and certain agents of his, whose names are to your orators unknown, to divide among them the receipts from said association on account of such contracts for such work under contracts as thereafter could be procured, and that they would by false and fraudulent means and representations, impose upon the said agent-
46 of the said The Springer Land Association, who were then and there negotiating in the making of said contract, Exhibit "A," who were to act as agents for said association in the letting, constructing and carrying on said contract, and especially in mak- the reservoir system aforesaid, and induce such agents of said association to consent that said Edwin H. Kellogg should be the engineer named in said contract Exhibit "A," and also the engineer

to subsequently, as such, control the work to be done in pursuance of said contract, and to make the estimates upon which payments would be made for the work so contemplated by the said contract Exhibit "A."

And your orators are informed and believe, and on such information aver, that to carry out such conspiracy that said Patrick P. Ford did procure his said co-conspirators and agents to frequently seek out the said agents of said The Springer Land Association engaged in the negotiations on behalf of said company, which finally resulted in said contract Exhibit "A," and in said contract with said Patrick P. Ford for the construction of said irrigating system, and misled such agents as to said Edwin H. Kellogg, and the said agents of said association being ignorant of the true character of said Edwin H. Kellogg, and of the said purpose and intention of said Ford, were informed by the said Patrick P. Ford and his said secret agents that said Kellogg was a thoroughly competent, fair and honest engineer, and said Ford and his said secret agents by their continuous efforts to that end, finally impressed upon the said agents of the said Springer Land Association the belief that said Kellogg was honest, just and competent, and thereby procured the said Edwin H. Kellogg to be named in said Exhibit "A," as the engineer to take charge of the said work, as stated in said contract, and to be agreed upon and accepted by said Patrick P. Ford and the agents of said The Springer Land Association as the engineer in charge in said written contract Exhibit "B" for the construction of said irrigating and reservoir system, all of which was procured to be done by said Patrick P. Ford and his said secret agents, as your orators are informed and believe, in collusion with each other and said Edwin H. Kellogg, to in some way and in some proportion to your orators unknown, share and divide amongst and with each other the money thereafter to be paid by your orators on account of said construction, and to procure false and fraudulent and wrongful estimates of such work, and thereby to fraudulently increase their gains and defraud your orators and said The Springer Land Association out of large sums of money.

Your orators further aver that in the manner and by the means aforesaid, as *guarantee*, are informed and believe the said Patrick P. Ford procured the said Edwin H. Kellogg to be accepted as such engineer, and procured all estimates heretofore made by such
47 Kellogg for work on said reservoir system, and procured the said contract for the construction of said system, attached to the bill of complaint in this case, and so your orators aver that said estimates and said last-mentioned contract should be set aside and held for naught, as having been fraudulently obtained.

Forasmuch, therefore, as your orator is without remedy in the premises, except by filing this his cross-bill in the said proceeding commenced by the said Patrick P. Ford, against your orators, and the other defendants in the said bill so filed by the said Patrick P. Ford, and to the end that the said Patrick P. Ford, who is hereby made party defendant to this cross-bill, may be required to make full and direct answer to the said —, but not under oath, the answer under oath

being hereby expressly waived, that an account may be taken by and under the direction of the court of the amount of work done and performed by the said Patrick P. Ford, under and by virtue of his said written contract of the amount paid to him by the said The Springer Land Association, on account of said work and labor, of the damage done to and accruing to your orators by reason of the facts in this cross-bill averred, of the claims for liens filed and pending as encumbrances upon said real estate, growing out of work performed for and material furnished to the said Patrick P. Ford, by said subcontractor and others.

Your orators pray that subpœna issue from this honorable court, directed to the said Patrick P. Ford, commanding him to be and appear before this honorable court on a certain day, and under a certain penalty therein to be fixed, then and there to answer all and singular the allegations, matters and things therein set forth. And to stand by and abide and perform such order and decree in the premises as shall seem meet and agreeable to equity and good conscience, provided the court shall determine such subpœna necessary or proper to issue; and if the court shall hold such writ necessary that he then be required to appear to this cross-bill.

And your orators further pray, that an account may be taken of the claims of lien filed against the said real estate in this cross-bill described, and of the liens and encumbrances claimed or existing thereon, by reason of work performed or materials furnished for said Patrick P. Ford, and in the construction of the said reservoir system as in this cross-bill referred to, and that the amount of such encumbrances, liens and claimed liens be fixed by a decree of this court, and the said Patrick P. Ford be decreed to completely remove the same so that said ditch system and reservoirs and real estate shall be free from encumbrances before he proceeds further with his said action, or such other order and decree relating to that subject as may be just and equitable.

48 Your orators further pray, that it may be decreed on the final hearing of this cause, that this action was prematurely commenced and the cause be dismissed. And, further decreed, that all the said ditches and reservoir system and real estate are free and unencumbered from any cloud or lien by reason of the filing of the said Patrick P. Ford of his said claim of lien, and by reason of the commencement of his said action, and that he be decreed to pay the Springer Land Association the damages by it sustained by reason of the wrongful acts of the said Patrick P. Ford in the cross-bill alleged.

LONG, FORT & BUNKER,
Solicitors for Defendants.

49 And afterwards, to wit, on December 29th, 1891, there was filed in said clerk's office the answer of Patrick P. Ford to the cross-bill in said cause, which said answer is in words and figures as follows, to wit:

Answer to Cross-bill.

TERRITORY OF NEW MEXICO, }
County of Colfax, } *ss:*

In the District Court for the Fourth Judicial District, Territory of New Mexico.

PATRICK P. FORD }
vs. }
THE SPRINGER LAND ASSOCIATION *et al.* }

Comes now Patrick P. Ford, complainant in the above-entitled cause, and defendant as to the cross-bill filed therein by the cross-complainants, The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock and The Springer Land Association, a corporation, and for answer to said cross-bill, this cross-defendant now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said cross-bill contained, for answer thereto, or to so much thereof as this cross-defendant is advised, it is material or necessary for him to make answer to, answering says:

That he admits the filing of the original bill of complaint in this cause, and admits the averments thereof, substantially as alleged in said cross-bill, and admits that on or about the first day of May, 1888, the Maxwell Land Grant Company was the owner of and in possession of the real estate in the original bill of complaint of this cross-defendant described; and that at about the said date the said Maxwell Land Grant Company entered into the contract in said cross-bill set forth, and attached thereto as Exhibit "A," and that the Springer Land Association, a corporation, succeeded to the rights of the parties of the second part in said contract so marked Exhibit "A," but as to whether or not they so succeeded for the use and benefit of the said The Springer Land Association, Christopher C. Strawn, C. M. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames and William A. Comstock, or for any or either of them, or as to whether each or any of said parties has a pecuniary interest that said contract with said Maxwell Land Grant Company should be carried out and performed, or an interest in the contract with this cross-defendant for the construction of the reservoirs and ditch systems in said contract mentioned, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

This cross-defendant admits that the Springer Land Association entered into a contract with this cross-defendant, being the contract set forth in the original bill of complaint, and that the requirements of said contract are substantially as in said cross-bill alleged, and as more specifically set forth in Exhibit "B," attached thereto and made a part thereof.

Admits that under said contract this cross-defendant agreed to commence work upon said reservoir system within ten (10) days after the signing of said contract, and fully complete the said work of constructing said reservoirs and ditches in said contract described, on or before the first day of July, 1889, and that he was to receive therefor compensation at the rate of eleven cents per cubic yard without classification at the times and in the manner in said specifications set forth.

This cross-defendant denies that it was contracted or agreed in said writing that final payment of the amount ascertained to be due on the final estimate of the engineer referred to in said contract, should be postponed or not due, or should not be made by the cross-complainant, The Springer Land Association, until the said Patrick P. Ford, this cross-defendant, had entirely relieved the said ditches, reservoirs or embankments from all liens; but admits that it was in said contract provided, that "the amount" due the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger of liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work. That whether or not the only reason which induced the cross-complainants to acquire the right of, in and to said contract with the Maxwell Land Grant Company attached to said cross-bill, or to undertake or enter into the contract with this cross-defendant for the construction of the work contemplated and provided for in said Exhibit "B," attached to said cross-bill, was the profits which they would be able to make by the increased value in said lands, growing out of the construction or maintenance of said improvements, or in the sale of said lands, or the division of the proceeds of sale, as provided for in said Exhibit "A," this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the same.

That as to whether or not the lands described in said Exhibit "A" would by reason of the construction of the improvements contemplated by said contract marked Exhibit "B," be in great demand or would sell readily, or yield to the cross-complainants' large or any profits or income as the result of such sales, or as
51 to whether or not it was for the purpose of selling said lands in the market, or rapidly selling the same at such advanced prices or value, that they, the said cross-complainants, acquired rights of, in or to said contract, with the Maxwell Land Grant Company, or that the contract with this said cross-defendant for such purpose, was entered into or said work undertaken, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defendant denies that such alleged facts were communicated to him, or well known by him, from other sources or from any source, before the said written contract marked Exhibit "B," and attached to said cross-bill, was entered into, or before the construction of said work was commenced.

And this cross-defendant denies that it was fully made known to

him before he entered into said contract, that if he failed to complete the same within the time agreed on, it would entail great loss and damage upon the cross-complainants; and denies that it was further made known to him at the same time or at any time, that if he allowed subcontractors, or persons performing labor for him, or furnishing materials to him, to file claims for liens upon said lands, either because of indebtedness existing against said Ford, and in favor of said persons for such work, labor or material, or because of any claim of such indebtedness, that it would so cloud or encumber the title to said lands as to destroy the sale thereof in market, or thereby greatly embarrass or damage the cross-complainants, or prevent the sales of real estate intended to be accomplished by means of said work: And this defendant denies that it was so or at all contracted by said cross-defendant, that he should not have or would not demand the last estimate made by the engineer until he had entirely removed all liens or encumbrances or claims for liens arising out of the work done by the said subcontractors for him, or any material furnished by any such subcontractor or that it was by said contract agreed that final payment or payments of all final estimates should be deferred or postponed until he made said system or real estate wholly or at all free from encumbrances.

And this cross-complainant denies that he failed to complete his said contract, or that failing to perform said work or labor as he had contracted to do, that he abandoned the same, or that he abandoned the same at all, or that he left the country after he had performed a part of said contract, or that he left a large number of persons who had performed work upon said reservoirs, ditches and systems as subcontractor under him, or who had furnished materials as such, claiming that he, the said cross-defendant, for such work or labor or material, was largely indebted to them therefor, except as hereinafter specifically stated and admitted.

52 And this cross-defendant further alleges, that as to whether or not claims of liens by a large or any number of persons performing labor or furnishing material in connection with said work, were filed in the office of the probate clerk of the county of Colfax, Territory of New Mexico, in which said lands were situated, asserting or claiming liens upon said ditches, reservoirs and real estate described in plaintiff's bill of complaint, for or on account of such alleged work, labor or material, or that thereby the title of the cross-complainant was greatly encumbered or clouded as to such real estate, or to their interests in the same this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defendant alleges upon information and belief, that no such liens or claims of liens by any subcontractors under him, were filed in the office of the probate clerk of the county of Colfax and Territory of New Mexico, within the period of time fixed by the statute of the Territory of New Mexico relating to the filing of liens of subcontractors, and that no valid lien, except the lien of this cross-defendant, has at any time been filed or has existed against

the said ditches, reservoirs and lands in the plaintiff's original bill of complaint described.

That as to whether or not said alleged liens of subcontractors were filed or claimed in such a way as to alarm purchasers and others who would have purchased large or any tracts of said real estate, at sums largely or at all in excess of the cost of the same to the cross-complainants, or that thereby the cross-complainants were prevented or were in any manner prevented, from making such sales, or any sale, or the profits, or any profits they would otherwise have realized from the sale of said lands, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the same.

And this cross-defendant denies that by reason of any failure on his part to perform said work, or to keep the said lands free from said alleged liens or encumbrances, the complainants have been damaged in a large sum, to wit: twenty thousand dollars ($20,000), or in any sum whatsoever.

And this cross-defendant denies that he has been made a party to any of the said several actions alleged to have been brought by persons claiming to hold liens upon said ditches, reservoirs or real estate, in the fourth judicial district sitting in and for the county of Colfax, or elsewhere, to enforce against said real estate claims of liens so filed; and on the contrary alleges that he has not been served with process or cited to appear in any such action whatsoever.

That as to whether or not the cross-complainants, or any of
53 them, have been compelled to appear in said alleged actions, or to expend a great amount of time of the value of one thousand dollars ($1,000), or of any value whatsoever, or to expend a large or any amount in solicitors' fees therein, in defending against said liens, or pay out and expend any sum of money whatsoever in settling, liquidating or adjusting any portion of said claimed liens so as to relieve the real estate from the cloud occasioned thereby to any extent or any part, this defendant has not and cannot obtain sufficient knowlege or information upon which to base a belief, and denies the same.

This cross-defendant further alleges that in making these contracts with the several subcontractors, being the subcontractors mentioned in the cross-complaint, it was in each of said subcontracts stipulated and agreed as follows: "The estimate for the work of each calendar month will be paid by the company on or before the 10th of the month following that in which the work is done. As soon as such estimate is paid, the said party of the second part will pay to the said subcontractor the amount of his several estimates, less ten (10) per centum retained as detailed in the specification. It is mutually agreed that the amounts of these several estimates will in nowise be demanded or paid in advance of the payment of the regular estimate." That the company therein mentioned was the cross-complainant, The Springer Land Association, and that the party of the second part mentioned in said subcontracts was this cross-defendant. That the terms of said several subcontracts, and

the fact that the amount of subestimates was not payable in advance of the payment by the cross-complainants of this cross-defendant's estimates was well known to the cross-complainants at the time of the doing of said work, and long before the commencement of this action. And this cross-defendant alleges that on the first day of May, 1889, there was furnished to this cross-defendant by one Edwin H. Kellogg, the engineer of the cross-complainants, and who is the engineer referred to in the contract between the Springer Land Association and this cross-defendant, as the engineer for said company, an estimate showing the amount of work performed under this cross-defendant's contract during the month of April, which, after deduction of ten per centum as provided in said contract, left an amount due under said estimate to this cross-defendant, of the sum of five thousand and ten dollars and ninety-two cents ($5,010.92); which, by the terms of said contract, was due and payable to this cross-defendant by the cross-complainant, on or before the 10th day of May, 1889: That under the said several contracts with subcontractors, being the contracts referred to in the cross-bill, no sum was due to said subcontractors from this cross-defendant until the cross-complainants should have paid to this cross-defendant the said sum of five thousand and ten dollars and ninety-two cents
54 ($5,010.92): That said cross-complainants have not paid at any time said sum of five thousand and ten dollars and ninety-two cents, or any portion thereof, and that the same still remains due and payable, and that if any liens have been filed by said subcontractors against the premises in the cross-bill and in the original bill of complaint described, the same was caused solely by the failure of the said cross-complainants to pay to this cross-defendant the said estimate of five thousand and ten dollars and ninety-two cents ($5,010.92), as aforesaid.

This cross defendant alleges that whether or not the existence of the action in said cross-bill mentioned of Henry Dargel, and the assertion by him of his claim of lien, has been or now is a great or any cloud or encumbrance upon the property of the cross-complainants, or whether the same has greatly or at all prevented, or does now prevent the sale of real estate, or constitutes any cloud upon or encumbrance upon said property, this cross-defendant has not sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defendant alleges, that any claim of lien asserted by the said Henry Dargel against the premises in the cross-bill, or in the original bill described, and interest based thereon, is caused solely by the failure of the cross-complainants to pay to this defendant, in accordance with the terms of the contract, marked Exhibit "B," and attached to the cross-bill, the amount due to this cross-defendant on the 1st day of May, 1889, being the said sum of five thousand and ten dollars and ninety-two cents ($5,010.92), and on account of the further failure of the said cross-complainants, as hereinafter more specifically alleged, to pay to this cross-defendant the final estimate, to wit: the sum of twelve thousand six hundred

and twenty-five dollars and fifty-three cents ($12,625.53), due and payable from the said cross-complainants to this cross-defendant.

And this cross-defendant denies that all estimates given by the engineer in charge of said work, prior to the final estimate, were long ago or at any time paid or discharged by the Springer Land Association, or that the cross-complainants should not be called upon or forced to pay such final estimate until the said claim of liens, clouds and encumbrances asserted by said subcontractors, as in said cross-bill alleged *or* wholly removed from the cross-complainants' property; and, on the contrary, this cross-defendant alleges that the sixth estimate furnished to this defendant by the engineer in charge of said work, the same being the estimate prior to the final estimate, and amounting as hereinbefore mentioned, to five thousand and ten dollars and ninety-two cents ($5,010.92), was never at any time paid to this cross-defendant by the said The Springer Land Association.

55 This cross-defendant further denies, that he ever at any time entered into any fraudulent arrangements or copartnership, or any arrangements or copartnership, with Edwin H. Kellogg, the engineer of said work, in the cross-complaint and in the original bill of complaint described, or that he by any other false or fraudulent means, either known or unknown to the cross-complainants, or in collusion with the said Edwin H. Kellogg, as to the amount of work actually performed by the said cross-defendant under this contract, or as to the completion of said work by him under said contract, or by any means whatsoever, procured the said Edwin H. Kellogg to make overestimates as to the work done from time to time, or any final estimate of the amount under said contract claimed to be due or unpaid to this cross-defendant, or that any fraudulent or false estimate was made showing an indebtedness from the cross-complainants, or any of them, on account of said work; and denies that the said Kellogg at the time of making his final estimate, or at any other time, had entered into a stipulation with this cross-defendant to defraud or cheat the cross-complainants.

This cross-defendant denies that he by means of any false statements or representations, or any fraudulent acts whatsoever, or in any other manner whatsoever, combined or confederated with the said Edwin H. Kellogg, or procured him to make a final estimate of said work, or to deliver the same to this cross-defendant. Admits that this cross-defendant demanded of the Springer Land Association payment of a final estimate furnished to him by the said engineer, being the engineer of the cross-complainants; but denies that said estimate was false or fraudulent, or that said demand was made by this cross-defendant with knowledge that the same was unjust or not due to him; and on the contrary, alleges that the said final estimate was just and due, and is now due, and owing to this cross-defendant. Admits that upon the refusal of said The Springer Land Association to make the payment of said final estimate, he filed his said claim for lien and brought this action to establish said lien; but denies that at the time of so doing he knew that the said

The Springer Land Association was in nowise indebted to him, and on the contrary, alleges that at the time of filing said lien, the said The Springer Land Association was largely indebted to this cross-defendant in the full sum of seventeen thousand and six hundred and thirty-six dollars and forty-five cents ($17,636.45).

And this cross-defendant denies that his said action, being the action brought by the original bill filed in this case, was for and to collect the said final estimate only; but alleges that the same is brought to collect the final estimate furnished to him by the said engineer, being, to wit: in the sum of twelve thousand six
56 hundred and twenty-five dollars and fifty-three cents ($12,625.53), and also to recover a previous unpaid estimate to the amount of five thousand and ten dollars and ninety-two cents ($5,010.92).

The cross-defendant further denies that at other or different times, or at any time, by any fraudulent means whatsoever or in any manner whatsoever, the said cross defendant procured other or earlier or any estimates to be made by the said engineer in excess of the amount due at the time of making the same; and denies that at the time of said final estimate, the said The Springer Land Association had greatly overpaid him, the said cross-defendant, for work done under said contract on said ditch system and reservoir; and denies that at the time of making said final estimate, anything remained due or unpaid to the said cross defendant under said contract, for or on account of any work by him done, not included in said final estimate, or for or on account of any other prior estimate; but, on the contrary alleges, as hereinbefore stated, that there was, at the time of rendering said final estimate, due not only the amount of said final estimate, but also, the amount of the last estimate previous thereto.

This cross-defendant denies that he failed to do or perform the work, which he did do under said contract, in a good or workmanlike manner, or to cause the same to be done, or in the manner provided for in said written contract; and denies that he failed to dig the ditches of the depth, width or length in said contract called for. Denies that he failed to make the various embankments of the heighth, depth, width or strength called for in said contract; and on the contrary, alleges that he, in every respect, performed said work, and caused the same to be performed in accordance with said contract and the specifications attached thereto, and in accordance with the directions of the engineer in charge of said work.

That whether or not the Springer Land Association, in reliance upon said contract, or otherwise, or in reliance upon the completion of said work, expended a large amount of money in placing said land upon the market for sale, or in employing agents to make such sales, or in advertising said ditch system, reservoirs or real estate, or in procuring special trains to be run from the East to the town of Springer; or procuring passage, transportation or railroad rates for persons desiring to look at or purchase said lands, or that whether such expenditure was in the sum of five thousand dollars ($5,000), or in any sum whatsoever, or whether the same was made upon the

faith of said contract, or in the belief that the work would be properly performed in the time named in said contract, or that all liens, claims of liens or encumbrances of every character would by the cross-defendant be removed from said ditch system or real estate, so that nothing would exist to embarrass said The Springer
57 Land Association in the sale or disposal of said lots, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

That as to whether or not, by the means in said cross-bill alleged, or by any other manner whatsoever, large or any numbers of persons were induced to come long or any distance from the East or elsewhere to examine said lands, with the view to purchase of large or any tracts of the same, or as to whether the said The Springer Land Association, through its agents, or otherwise, had actually sold to divers or any purchasers large or any tracts of said real estate described in said bill of complaint, or other lands under said irrigating ditch, at a profit to them largely or at all in advance of the original costs, or to a net profit to the Springer Land Association of six thousand dollars, or any sum, whatsoever, or as to whether such purchasers stood ready to pay therefor at such profit, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

And this cross-defendant denies that such purchasers were prevented from making such alleged purchases, or deterred therefrom, by any failure of this cross-defendant to complete the said ditch at the time specified in said contract, or by his failure to keep said ditch system, reservoirs or real estate, free from all or any claims of liens or encumbrances, and that, on the contrary, the existence of any such liens was due solely to the failure, on the part of the cross-complainants to pay to this defendant the amount due to him under his contract, as hereinabove set forth.

That as to whether or not a large or any number of persons, upon visiting said lands, at the town of Springer, or elsewhere, were informed or became aware of the fact that the said liens of subcontractors and others were filed in the probate court or were intended to be enforced against the said lands, or as to whether such persons were thereby alarmed, caused or induced to refuse to carry out their contracts of purchase, or to purchase said lands, or any part thereof; or whether the said The Springer Land Association was in the manner aforesaid, or in any manner, damaged in the sum of six thousand dollars ($6,000), or in any other sum whatsoever, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

This cross-defendant further alleges that as to whether as a means whereby the more rapidly to make sale and disposal of said real estate under said ditch system, the Springer Land Association, at an expense of ten thousand dollars ($10,000), or of any other
58 sum, established near the town of Springer, a model farm, and as to whether or not they planted all kinds of grain or root crops thereon for the purpose of demonstrating to buyers of land that the soil of said real estate was first class in quality, or that

with a sufficient supply of water it would produce all kinds of crops abundantly, or otherwise, to the great profit of those who might buy such lands or cultivate the same, and as to whether or not said model farm did produce abundantly, or as to whether said The Springer Land Association kept a large or any number of employees, whose sole duty it was to show purchasers over said land or over said farm, or as to whether or not a great number, or any number of persons were induced thereby to contract for the purchase of large or any tracts of land under said ditches, or whether or not out of said purchases said The Springer Land Association would or could have made large or any profit but for the failure of said proposed purchasers to purchase by reason of said liens or encumbrances, or as to whether or not such purchasers became alarmed, by reason of the existence of said alleged claims or liens or encumbrances, or refused, by reason thereof, to complete their contracts for purchase, or as to whether or not said purchasers alleged as an excuse that they feared complications or litigation by reason of such claimed liens or encumbrances upon said land, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

That as to whether or not the said The Springer Land Association lost the sale of divers or any tracts of land contracted to be sold at prices largely or at all in excess of the original purchase price, or so lost profit, or has been greatly or at all damaged, or in any sum largely or at all in excess of the value of any work done or caused to be done by this cross-defendant after the estimate next before the last was rendered, this cross-defendant has not, and cannot, obtain sufficient knowledge or information upon which to base a belief. But this cross-defendant denies that by reason thereof, or from any cause or reason whatsoever, there is now nothing due or owing to him, the said cross-defendant, on account of the work by him done under said written contract, but alleges that there is due to him the full sum of seventeen thousand six hundred and thirty-six dollars and forty-five cents ($17,636.45), as hereinbefore alleged.

This cross-defendant denies that the fifteenth specification of the said written contract, by its terms or otherwise, postpones payment of the final estimate until by this cross-defendant shall be removed all liens, claims of liens or encumbrances of any character from said real estate, reservoirs or ditch system, growing out of or connected with the work done for him or material furnished for him by sub-contractors, or others; and denies that he filed his bill of
59 complaint herein prematurely, or before his last estimate was due or payable; and alleges that any failure on the part of him, said cross-defendant, to keep such reservoir system and real estate free from liens, claimed liens or encumbrances, is due solely to the failure on the part of the cross-complainants to pay this cross-defendant the amounts due him under this contract, as aforesaid.

This cross-defendant further alleges that said ditches and reservoirs, so far as work by him contracted to be performed is concerned, were constructed according to said contract, plans and specifications, but as to whether or not, being so constructed, the said ditches and

reservoirs were or would have been sufficient to bring under irrigation thirty thousand (30,000) acres of land, or whether or not the same did or would have made lands quickly salable at prices so much in advance of the original purchase price to the cross-complainants as to have made said cross-complainants a large or any net profit, this cross-defendant has not, and cannot, obtain sufficient knowledge or information upon which to base a belief.

That as to whether or not, in the event that said premises had been kept free from liens, claimed liens or encumbrances, purchasers who had agreed with the Springer Land Association to take conveyances of, or pay for the same, at prices affording said The Springer Land Association a large or any profit, being to wit, the sum of five thousand dollars ($5,000), or to any other sum, would have done so, or were willing and ready to do so upon the performance of said work or removal of said liens, claims of liens or encumbrances, this cross-defendant has not, and cannot, obtain sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defe[illegible]ant alleges that any failure of purchasers of said land to so tak[illegible]nd pay for the same was not due to failure on the part of this c[illegible]s-defendant to fully perform said work, and denies that any failu[illegible]on the part of this cross-defendant so to perform his said contract, caused the cross-complainants to lose the benefit of any contracts made by them with purchasers for the sale of lands, or to lose the profits which they could have made thereon, to their damage in the sum of five thousand dollars ($5,000), or in any other sum whatsoever.

That as to whether or not the cross-complainants, or the members of the Springer Land Association, or the officers or stockholders of the Springer Land Association, a corporation, or as to whether or not any or either of them were at the time of executing the contracts marked Exhibit "A," unacquainted with Edwin H. Kellogg, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief; but this defendant denies that said officers and cross-complainants were unacquainted
60 with said Kellogg at the time of executing the said contract marked Exhibit "B;" and on the contrary alleges that certain of the cross-complainants, to wit: Christopher C. Strawn and Melville W. Mills, were acquainted with the said Edwin H. Kellogg for many months prior to the execution of the contract marked Exhibit "B." and attached to the cross-bill, being the contract between the Springer Land Association and this cross-defendant.

This cross-defendant denies that he had knowledge that the cross-complainants, or any of them, were about to enter into said contract with the Maxwell Land Grant Company, and denies that at the time of the making of the said contract marked Exhibit "A," and attached to the cross-bill, this cross-defendant intended or expected to secure from the Springer Land Association the construction of the reservoir or irrigating system contemplated in said contract marked Exhibit "A," attached to said cross-bill, or that he expected or intended to procure the agents of the said The Springer Land

Association negotiating with said Maxwell Land Grant Company in making said contract, marked Exhibit "A," and attached to the cross-bill, to agree to the selection of Edwin H. Kellogg as the engineer to be named in said contract; and denies that he had then or did ever at any time conspire or agree with said Kellogg to unduly or wrongfully, or at all favor this cross-defendant in estimates thereafter or at any time to be made, or in the construction of said work on said reservoirs and ditches thereafter to be done, or that he intended to, or ever at any time did conspire or agree with the said Kellogg to enable the cross-defendant thereby or in any manner whatsoever to gain any wrongful or undue advantage, or any advantage whatsoever, over the said The Springer Land Association in the execution of the work contemplated by said contract, or in any other manner or matter whatsoever, or thereby to procure from said The Springer Land Association pay to a large or any amount for work never done. And denies that this cross-defendant conspired, confederated, arranged or agreed with certain or any persons, or secret or any agent, to divide among them, or with any person whatsoever, the receipts from said association on account of such contract for work; and denies that he ever at any time conspired or agreed with any person whatsoever by any false or fraudulent means or representations to impose upon any agent of the Springer Land Association in reference to the letting, constructing or carrying on of said contract, or in reference to making the reservoir system aforesaid, or in any other manner or matter whatsoever; and denies that he conspired or agreed with any one whomsoever to induce, or that he did induce such or any agents of said association to consent that said Elwin H. Kellogg should be the engineer named in said contract, marked Exhibit "A," and attached to the cross-bill, or that he should be the engineer to control the work to be done in pursuance of said contract, or to make
61 terms upon which payment should be made for the work so contemplated by said contract or in any other matter whatsoever.

This cross-defendant further denies that for the purpose of carrying out said conspiracy, or for any other purpose whatsoever, or in any manner whatsoever, he procured any co-conspirators or agents to frequently or at all seek out any agent or agents of said The Springer Land Association, engaged in negotiations on behalf of said company which finally resulted in said contract, marked Exhibit "A" attached to said cross-bill, or in said contract with this cross-defendant for the construction of said irrigating system, or engaged in any other negotiations whatsoever.

That as to whether or not the said agents of said association were ignorant of the true character of said Kellogg, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defendant denies that the said agents or any agents of the cross-complainants, were informed by the said cross-defendant or by any secret or other agents of him, the said cross-defendant, that said Kellogg was a truly competent, fair or honest engineer;

and denies that he, the said cross-defendant, or any agent, secret or otherwise, of him, the said cross-defendant, by continuous or any effort to that end, finally or at all impressed upon the agents of the said The Springer Land Association, the belief that said Kellogg was honest, just or competent, or that he thereby or in any manner whatsoever procured the said Kellogg to be named in said Exhibit "A" attached to the said cross-bill as the engineer to take charge of said work so to be agreed upon and accepted as the engineer in charge in said written contract marked Exhibit "B," attached to said cross-bill, being the contract with this cross-defendant, for the construction of said irrigating and reservoir system; and denies that any of the matters or things aforesaid were procured to be done by this cross-defendant, or by any agent, secret or otherwise of his, in collusion with each other, or with said Kellogg, or with any other person whatsoever, for the purpose in any way, or in any proportion or upon any share whatsoever to divide among them, or with any other person whatsoever, the money thereafter to be paid by the cross-complainants on account of said construction, or to procure false or fraudulent or wrongful estimates of said work, or thereby to fraudulently increase their or his gain, or defraud the cross-complainants, or the said The Springer Land Association, or any other party whatsoever, out of large or any sums of money.

And this cross-defendant denies that he in any manner whatsoever procured the said Edwin H. Kellogg to be accepted as such engineer; and denies that by any of the means or devices or
62 in the manner set forth in said cross-bill he procured estimates to be made by said Kellogg, for work on said reservoir system, or thereby procured the contract aforesaid for the construction of said system; and denies that the estimates or said contract should be set aside or wholly for naught held as having been fraudulently obtained; and, on the contrary, this cross-defendant alleges that the said contract, marked Exhibit "B," and attached to the cross-bill, being the contract on which this action was originally brought by this cross-defendant as complainant, was entered into fairly and openly by and between this cross-defendant and the Springer Land Association, and that this cross-defendant has in all respects whatsoever, fully complied with the terms and conditions thereof, and has performed his work thereunder in obedience to the orders of the engineer selected and appointed by the complainants herein.

And this cross-defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said cross-bill charged, without this that there is any other matter, cause or thing in the said cross-complainants' said cross-bill contained material or necessary for this cross-defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this cross-defendant; all which matters and things this cross-defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct. And humbly prays to be hence dismissed as to said cross-bill, with his reasonable costs and charges in this behalf most wrongfully sustained; and prays that he may have judgment

against the cross-complainants, being defendants to his original bill of complaint, as in said bill of complaint prayed, and for his costs.

WOLCOTT & VAILE,
Solicitors for Patrick P. Ford, Cross-defendant.

UNITED STATES OF AMERICA, *District of Colorado.*

STATE OF COLORADO, }
County of Arapahoe, } ss:

Patrick P. Ford, being duly sworn, deposes and says: That he is the defendant to the cross-bill in the above-entitled cause, and that he has read the foregoing answer to said cross-bill, and knows the contents thereof; that the same is true, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

PATRICK P. FORD.

Subscribed and sworn to before me, this 26th day of December, A. D. 1891.

[SEAL.]

FRANCIS W. TUPPER,
Clerk Dist. Ct. U. S., Colo.,
By CHARLES W. BISHOP,
Deputy Clerk.

63 And afterwards, to wit, on March 24th, there was filed in said clerk's office a stipulation, which said stipulation is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

In the District Court of the Fourth Judicial District.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } No. 1301.

Stipulation.

64 It is hereby stipulated by and between the parties to the above-entitled cause, that the defendants shall complete taking their testimony upon the issues formed, as well upon the cross-bill as upon the original bill, on or before the evening of Thursday, March 24th, 1892; that the plaintiff shall have until May 20th thereafter within which to take his testimony in rebuttal, and that no evidence shall be taken in said cause subsequent to the 20th day of May, 1892, unless time is extended by the court, or judge, on cause shown, and that as early as practicable after the completion of testimony said cause shall be set down for final hearing and argument.

Replication by defendant to plaintiff's answer to the cross bill shall be considered as filed.

It is hereby further stipulated that an order of court may be forthwith entered in accordance with the terms of this stipulation, extending the time of defendants and cross-complainants for taking testimony until and including the 24th day of March, 1892, and the time of complainant and defendant to cross-bill for rebutting testimony until the said 20th day of May, 1892.

WOLCOTT & VAILE,
Solicitors for Plaintiff.
LONG & FORT,
Solicitors for Defendants.

And afterwards, to wit, on the 4th day of the regular March term, A. D. 1892, of the Colfax county district court, the same — March 24th, 1892, the following among other proceedings *being* were had, to wit:

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

Come now, the parties in the above-entitled cause, by their counsel and file stipulations. It is thereupon ordered by the court that time for taking proofs be, and the same hereby is, extended according to the term of the stipulation.

65 And afterwards, to wit: on February 6th, there was filed in said clerk's office, by defendants' counsel, a motion to have said cause referred to a master, which said motion was in words and figures as follows:

66 In the District Court for the Fourth Judicial District of the Territory of New Mexico, Sitting within and for the County of Colfax.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.*

Comes now the defendant-, The Springer Land Association *et al.*, for whom Long & Fort appear, and show to the court that evidence in this case is very voluminous, consisting of about 1,600 pages, typewritten, and the question involved will necessarily require a careful reading of all the evidence to correctly understand the same; that W. E. Gortner was appointed, March 19th, 1891, examiner, but a master has never been appointed. That complainants have submitted to these defendants a proposition as to the time which should be properly consumed in the argument of the case, to properly present the same to the court, and such proposition is to commence the argument on Wednesday morning of this week, and to close the same at noon of Saturday, the time to be evenly distributed between the respective parties, complainant and defendant to the action; that these defendants believe the time named in said proposition to

be the least in which the case can be properly presented, and if any change should be made as to argument, that the time should be greater rather than less. That the reading of the testimony, along with the necessary exhibits in the cause, understandingly, so as to be able to comprehend the bearings of the various statements in evidence, and the weight to be attached to the same cannot be done in less than a week, and the cause cannot properly be considered without such reading. These defendants move the court to now refer the evidence in the cause to some capable and experienced master, to hear arguments, read and consider the evidence and report his conclusions as to the facts and law, to the court, at some early and convenient day, the argument to commence before such master, on Wednesday morning of this week.

Dated this 7th day of February, A. D. 1893.

LONG, FORT & TEWKSBURY,
Solicitors for Certain of the Defendants.

Which motion was denied, and defendants excepted to the ruling. And thereupon the court proceeded to hear the case, and the following evidence, heretofore taken, filed and published in said cause, was submitted to the court.

67 And afterwards, to wit: on the second day of the regular March term of the district court, within and for the county of Colfax, the same being Tuesday, March 28th, 1893, the following among other proceedings were had, to wit:

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery.

Comes now the complainant in the above-entitled cause by his solicitors and files findings of fact and conclusions of law, and a decree is also filed, which is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax. }

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } No. 1301.

This cause having come on for final hearing before the court upon the bill of complaint, the answer thereto and the replication to such answer; and upon the cross-bill, the answer thereto and the replication to such answer; and upon the evidence taken by the parties, in support of their respective allegations; and the court having fully considered the issue joined between the parties, and the evidence adduced thereon and the arguments of counsel; the court doth now find the following facts, to wit:

I.

That on the 26th day of October, 1888, the defendant, The Springer Land Association, entered into a contract with the complainant, Patrick P. Ford, whereby the latter agreed to furnish all necessary tools and labor, and to perform all the work of grading required in the construction of the Cimarron ditch and its accessories, for which the said The Springer Land Association, agreed to pay to said Patrick P. Ford eleven cents per cubic yard, without classification; the work to be completed on or before the first day of July, 1889.

II.

By the specifications attached to said contract and made part thereof, it was provided, that monthly estimates should be made by the engineer of the Springer Land Association, on or about the first day of each month, of the quantity of material moved by the contractor during the preceding month; that the said engineer should certify the amount to the company, together with an account of the same at the price stipulated, which account should be audited by the company, without unnecessary delay and the amount thereof, less ten per cent. retained, should be paid to the contractor in cash, within ten days thereafter; and that the retained percentage
68 should be held by the company as a guarantee for the faithful completion of the work, and be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work.

III.

It was also provided in said specifications as follows:

"The amount due to the contractor under the final estimate will only be paid upon a satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work."

IV.

The specifications attached to said contract made a specific provision in reference to the embankment for reservoir No. 7, which, among other things, provided as follows:

"On the line marked for the top of the embankment, a trench 8 feet wide and 1 to 4 feet deep, will be excavated, the material being placed in the outer part of the embankment."

And also contained the following provision:

"All material put in this embankment will be borrowed from the inner or water side, leaving a berme of 25 feet from the toe. The price named for embankment will include the total haul, as no overhaul estimate will be made. The dimensions of this bank will be as follows: Width of top 12 feet; inner slope 3 feet horizontal to 1 foot vertical; the outer slope will be 1½ to 1; the greatest height of center line will be 26 feet."

Said specifications also provided as follows:

"All orders of the engineer, concerning any part of the work, must be promptly obeyed."

V.

By the terms of an agreement made on the first *of* day of May, 1888, between Henry Whigham, as receiver of the Maxwell Land Grant Company, approved by M. P. Pells, the agent of the income bondholders of said company, of the first part, and C. C. Strawn, W. J. Johnston, M. W. Mills and such other persons as they might associate with them, parties of the second part, it was provided, that the parties of the second part, or those who should be associated with them, should construct a system of ditches and reservoirs, including those afterwards described in the contract of the complainant with the defendant, The Springer Land Association, upon certain terms in said contract specified; whereby the said parties of the second part, in said contract of May 1st, 1888, were to receive an interest in the proceeds of certain lands situated under and in the vicinity of said system of ditches.

VI.

69 The defendant, The Springer Land Association, is the successor in interest to the said parties of the second part, in said contract of May 1st, 1888.

VII.

By the terms of said contract of May 1st, 1888, one E. H. Kellogg was designated as the engineer to have charge of the construction of said system of ditches and reservoirs.

VIII.

The complainant in this suit, Patrick P. Ford, was not a party to said contract of May 1st, 1888, and had no voice in the selection of said E. H. Kellogg as engineer.

IX.

Subsequent to October 26th, 1888, the complainant entered upon the performance of his contract for the grading for said Cimarron ditch and its accessories, including the said reservoir No. 7.

X.

The engineer in charge of said work, as the representative of the defendant, The Springer Land Association, was, throughout the period of construction of said ditches and reservoirs, E. H. Kellogg, the party designated as such engineer in said contract of May 1st, 1888.

XI.

Prior to July 1st, 1889, the date limited in said contract of October 26th, 1888, the complainant, Patrick P. Ford, completed his work

of grading for said ditches and reservoirs, with the acceptance and approval of the defendant's engineer, E. H. Kellogg.

XII.

On the 13th day of June, 1889, the defendant's engineer gave to the complainant a written acceptance of said work, stating that the same had been completed and had been accepted by said engineer, and that the complainant was entitled to compensation in final settlement thereof for 441,396 cubic yards of excavation and embankment, at 11 cents per cubic yard, amounting to $48,543.56; and that the balance due upon said final estimate after deducting all former estimates, paid and unpaid, was $12,625.53.

XIII.

On or about the first day of May, 1889, the defendant's engineer, E. H. Kellogg, gave to the complainant a partial estimate, being estimate No. 6, showing amount due on account of said estimate, after reserving 10 per cent., to be $5,010.92, which amount has never been paid.

XIV.

In rendering the estimate for January 1st, 1889, the engi-
70 neer included $45.85 for extra work at a head-gate, being work not covered by the contract of October 26th, 1888; but in rendering the February estimate this amount was apparently by inadvertence deducted; and this item for extra work has never been paid.

XV.

Additional extra work was performed by Patrick P. Ford to the amount of $401, less $14, being $387, and a bill therefor was authorized and approved by the defendant's engineer, E. H. Kellogg; and the amount of this bill has never been paid.

XVI.

There is due to the contractor, Patrick P. Ford, from the defendant, The Springer Land Association, pursuant to the terms of the contract, as per estimates of the defendant's engineer, E. H. Kellogg, the sixth estimate, due May 10th, 1889, to wit: $5,010.92; the final estimate, due June 13th, 1889, $12,625.53; and for extra work, due June 13th, 1889, the sum of the items of extra work above mentioned, to wit: $432.75.

XVII.

On July 3rd, 1889, the complainant, Patrick P. Ford, caused to be filed in the recorder's office of Colfax county, a notice of mechanics' lien, sworn to on the 2nd day of July, 1889, which had attached thereto a copy of the contract of October 26th, 1888, with the specifications thereto attached. Said notice named the Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W.

Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, the Springer Land Association, a corporation of the Territory of New Mexico, the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter and Frank Springer, trustees of the Maxwell Land Grant Company, acting under the name, style and title of the board of trustees of the Maxwell Land Grant Company, as owners or reputed owners; and stated the sum of $17,634.27 as "the balance due and owing to the said Patrick P. Ford, by the aforesaid owners or reputed owners, after deducting all just credits and offsets for excavating and embankments," performed under said contract; and also stated that there was due the "further sum of $390, for extra excavating and hauling ordered by *by* the engineer in charge of said ditch."

XVIII.

Said notice of mechanics' lien, in addition to the description of the ditch and reservoirs referred to in said contract of October 26th, 1888, described the following lands as lands to be irrigated thereby, to wit: Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3,
71 10, 2, 1, 12 and 5, in township 26 north, of range 21 east; and also sections 30, 31, 29, 32, 33, 34 and 35 in township 26 north of range 22 east; and also sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5 and 15, in township 26 north of range 22 east; and also sections 20, 21, 22, 23, 26, 25, 36, 35 and 27, in township 25 north of range 22 east, in Colfax county, New Mexico.

And said notice of mechanics' lien stated as follows: "The names of the reputed owners of the lands hereinabove mentioned are the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter and Frank Springer, trustees of said company, acting under the name, style and title of the board of trustees of the Maxwell Land Grant Company."

XIX.

The lands described in said notice of lien are included in the description of lands mentioned in the contract of May 1st, 1888, as lands to be irrigated by said system of canals therein provided to be constructed, and the proceeds of the sale whereof should be subject to the terms in said contract set forth.

XX.

It is admitted in the answer of the Springer Land Association, Christopher C. Strawn, C. M. Barnes, M. W. Mills, W. J. Tewksbury, F. J. Eames, W. A. Comstock, and the Springer Land Association, a corporation of the Territory of New Mexico, to the bill of complaint, that the lands described in the complaint are covered by the ditches above mentioned, and are appurtenant thereto.

XXI.

It is alleged in the bill of complaint and admitted in the answer of the defendants, that the defendant, The Springer Land Association, through its agents and officers, claimed to be the owners of said ditch, lands, reservoirs and other property in the bill of complaint described.

XXII.

It is averred in the complaint and admitted in the answer, that, prior to the making of the contract of October 26th, 1888, the Maxwell Land Grant Company owned the land described in the bill of complaint, and still claim to have some right, title or interest in said land; and that the said The Maxwell Land Grant Company had entered into a contract (being the contract of May 1st, 1888,) by which the Springer Land Association was to have the right to construct said ditch and its reservoirs and accessories, on the land of the said The Maxwell Land Grant Company.

XXIII.

The complainant, Patrick P. Ford, sublet a part of the work under his contract of October 26th, 1888, his subcontracts being in writing, and made with the approval of the defendant's en-
72 gineer, E. H. Kellogg; and said contract of October 26th, 1888, contained this clause in the specifications made part thereof, to wit:

"Subcontracts must be submitted to the engineer and receive his approval before work is begun under them. No second subcontracts will be allowed, and subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer."

XXIV.

Each of the subcontracts made by the complainant, Patrick P. Ford, with the subcontractors contained a clause reading as follows:

"An estimate for the work of each calendar month will be paid by the company (meaning the Springer Land Association) on or before the 10th of the month following that in which the work is done. As soon as such estimate is paid, the said party of the second part (Patrick P. Ford), will pay to the subcontractor the amount of his subestimates, less ten per centum retained, as detailed in the specifications.

It is mutually agreed that the amount of these subestimates will in no case be demanded or paid in advance of the payment of the regular estimate."

XXV.

The complainant, Patrick P. Ford, paid to his several subcontractors, in accordance with the terms of his subcontracts, all amounts due under the first five monthly estimates made by the defendant's engineer, but at the time of the commencement of this

suit had not paid all that was due under the sixth (May, 1889) estimate, or under the final estimate of June 13th, 1889, the same being the estimates heretofore found not to have been paid to the said Patrick P. Ford by the defendant, The Springer Land Association.

XXVI.

Subsequent to the making of the final estimate of June 13th, 1889, liens against said property were filed in the following order: Patrick P. Ford first filed a lien on the 3rd day of July, 1889, as heretofore found; Subcontractor McGarvey filed a notice of lien on the 25th day of July; Subcontractor Dargel filed a notice of lien on the 1st day of August, 1889; Subcontractor McGarvey made a second filing of notice of lien on the 5th day of August, 1889. The amount claimed in the lien of the complainant, Patrick P. Ford, included all sums that would be due to his subcontractors, as shown by their liens subsequently filed.

XXVII.

The evidence does not sustain the allegation of the cross-bill, that the complainant, Patrick P. Ford, entered into some
73 fraudulent arrangement or copartnership with Edwin H. Kellogg, the engineer in charge of said work; or was in collusion with the said Edwin H. Kellogg as to the amount of work actually performed by said Patrick P. Ford under said contract, or as to the completion of said work by him under said contract; or that by means thereof he procured the said Edwin H. Kellogg to make overestimates as to the work done, from time to time; or a false or fraudulent final estimate on account of said work; or that the said Kellogg, at the time he made such final estimate, had entered into a conspiracy with the said Ford to defraud and cheat the said defendant.

XXVIII.

The evidence does not sustain the allegation of the cross-bill, that the said Patrick P. Ford combined or confederated with the said Edwin H. Kellogg and procured him to make a final estimate of the said work and to deliver the same to the said Patrick P. Ford.

XXIX.

The evidence does not sustain the allegation of the cross-bill, that at other and different times and by like fraudulent means or by other fraudulent means, the said Patrick P. Ford procured other and earlier estimates made by the said engineer, in excess of the amount due at the time of making the same.

XXX.

The evidence does not sustain the allegation of the cross-bill, that at the time of the said final estimate the said The Springer Land Association had greatly or at all overpaid the said Ford for work done under said contract for said ditch system and reservoirs.

XXXI.

The evidence does not sustain the allegation of the cross-bill, that the said Patrick P. Ford failed to do and perform the work which he did not do on said contract in a good and workmanlike manner and cause the same to be done as provided in said written contract.

XXXII.

The evidence fails to sustain the allegation of the cross-bill, that the complainant, Patrick P. Ford, failed to dig the ditches to the depth, width and length in said contract called for; or that he failed to make the various embankments of the height, depth, width or strength called for in said contract, or that he never finished or completed the same.

XXXIII.

74 The evidence does not sustain the charge that complainant, Patrick P. Ford, had anything to do with the selection of Edwin H. Kellogg as engineer for the Springer Land Association.

XXXIV.

The complainant, Patrick P. Ford, in the performance of his work under said contract of October 26th, 1888, personally constructed that part of the embankment of reservoir No. 7, extending from the south end thereof to station 26, being 2,600 feet; and residue of said embankment, from station 26 to the north end thereof, was constructed by a subcontractor, Henry Dargel.

XXXV.

The complainant, Patrick P. Ford, constructed originally his part of said embankment of reservoir No. 7, to the maximum height of 26 feet, as required by his contract, and with the slopes and in the manner by said contract required; leaving a berme at the inner toe thereof of 25 feet in width.

XXXVI.

By mistake of the defendant's engineer, E. H. Kellogg, that portion of the said embankment of reservoir No. 7, constructed by the subcontractor, Henry Dargel, was built to a maximum height of more than 27 feet, being 1 foot higher than the original contract requirements and 1 foot higher than the portion originally constructed by said complainant, Patrick P. Ford.

XXXVII.

The defendant's engineer, E. H. Kellogg, subsequently required the complainant, Patrick P. Ford, to put on additional material upon his portion of said embankment, so as to make the height thereof correspond with the height of the work performed by said Henry Dargel; and for the purpose of obtaining the material therefor, instructed him to take earth from the 25-foot berme, which he had left at the inner toe of the embankment.

XXXVIII.

The original construction by the complainant, Patrick P. For of his part of said embankment, was in accordance with the spec fications of his contract, and in accordance with stakes set for sai work by the defendants' engineer, E. H. Kellogg.

XXXIX.

The complainant, Patrick P. Ford, was in no respect responsibl for the mistake of the defendant's engineer, E. H. Kellogg, abov mentioned or for any consequences resulting therefrom.

XL.

No damage resulted to the defendant or to the embankment said reservoir No. 7, by reason of the reduction in the heigh
75 of the berme originally left at the inner toe of said em-men

XLI.

The defendant, The Springer Land Association, did not cause wave-break to be constructed for the protection of the embankmen of reservoir No. 7, until after water had been turned against th same and after damage had accrued thereby.

XLII.

The main portion of any damage resulting from the action water on said embankment was at and in the vicinity of the outl pipe, which was located at station 30, being about 400 feet north the north end of that portion of the embankment built by the com plainant, Patrick P. Ford, personally.

XLIII.

The complainant, Patrick P. Ford, completed his work under th contract of October 26th, 1888, in accordance with the terms of hi contract and specifications thereto attached.

Conclusions of Law.

I.

The defendant, The Springer Land Association, is bound by th acceptance and approval of complainant's work by its enginee Edwin H. Kellogg, and by the estimates made by such engineer.

II.

The defendant, The Springer Land Association, having failed t pay the sixth estimate, as well as the seventh or final estimate, th filing of liens by subcontractors, subsequent to the filing of th complainant's lien, did not result through any failure on the par of the complainant to liquidate his just indebtedness as connecte with the work.

III.

The complainant, Patrick P. Ford, is entitled to judgment against the defendant, The Springer Land Association, in the principal sum of $18,069.20, with interest at the rate of six per cent. per annum on $6,010.82 thereof, from May 10th, 1889, and upon residue of said sum from June 13th, 1889.

IV.

The complainant, Patrick P. Ford, is entitled to a decree of foreclosure of his mechanics' lien as against all of the defendants; such decree to provide that the complainant's lien is for the amount
76 mentioned therein, with interest, and attaches to all the ditches and lands in said lien and in the bill of complaint described; and that the said premises may be sold in accordance with the terms of the statute, for the satisfaction of said lien.

And decree may be prepared accordingly.

JAMES O'BRIEN,
Chief Justice, etc.

Dated March 28th, 1893.

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

In the District Court for the Fourth Judicial District of the Territory of New Mexico in and for said County.

PATRICK P. FORD, Plaintiff,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company, a Corporation; Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Defendants. } Decree.

This cause now coming on for decree in accordance with the findings of fact and conclusions of law heretofore by the court made and entered in this cause, it is now

By the court ordered, adjudged and decreed: that the plaintiff, Patrick P. Ford, have a lien for the sum of twenty-two thousand and ninety-seven dollars and seventy-five cents ($22,097.75), being for the amount mentioned in his notice of lien, with interest at six (6) per cent. to the date of this decree, upon the following-described real estate, property and premises, situated in the county of Colfax and Territory of New Mexico, to wit: The certain ditch, canal and reservoirs commonly known as the Cimarron ditch and its accessories, the said ditch beginning at a point where the Ponil and

Cimarron rivers meet to form the Cimarron, thence continuing in a devious course easterly, to a point on the Atchison, Topeka and Santa Fe railway, about five (5) miles northeast of the town of Springer, in the county of Colfax, Territory aforesaid, being in length about twenty-six (26) miles; and the said ditch and land appurtenant thereto for right of way, being of about the uniform width of sixty (60) feet, together with all lateral ditches and reservoirs, and the land covered by and appurtenant to the same, as aforesaid; also twenty-two thousand (22,000) acres of land appurtenant to said ditch, the said land being also situated in the said county of Colfax, Territory of New Mexico, and under the said ditch, and to be irrigated thereby, and described
77 according to townships and sections as follows, to wit: Sections thirty (30), thirty-two (32), thirty-three (33), twenty-eight (28), twenty-two (22), twenty-three (23), twenty-six (26), twenty-four (24), twenty-five (25), thirty-six (36), twenty-seven (27), thirty-one (31), four (4), three (3), ten (10), two (2), one (1), twelve (12) and five (5), in township twenty-six (26) north, of range twenty-one (21) east; also sections thirty (30), thirty-one (31), twenty-nine (29), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), in township twenty-six (26) north, of range twenty-two (22) east; also sections two (2), three (3), ten (10), eleven (11), fourteen (14), seventeen (17), eighteen (18), seven (7), six (6), five (5) and fifteen (15), in township twenty-six (26) north, of range twenty-two (22) east; also sections twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-six (26), twenty-five (25), thirty-six (36), thirty-five (35), and twenty-seven (27), in township twenty-five (25) north, of range twenty-two (22) east.

It is further ordered, adjudged and decreed, that the defendants, The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, and The Springer Land Association, a corporation, pay, or cause to be paid, within ninety (90) days from the date of this decree, the said sum of twenty-two thousand and ninety-seven dollars and seventy-five cents ($22,097.75), with interest from this date at six (6) per cent. per annum; that three thousand dollars ($3,000) of said sum of $22,097.75 shall, by the said defendants, be paid to the clerk of this court, subject to the further order of the court, as hereinafter provided, and the residue of said sum of $22,097.75, with interest upon said total sum from the date of this decree to the time of payment, shall, by the said defendants, be paid to the plaintiff herein, Patrick P. Ford, or his solicitor, and said defendants shall take receipt therefor, which receipt shall by the said defendants be filed with the clerk of this court, within the period hereinabove limited; and the said defendants shall, within said period of ninety (90) days from this date, also pay to the clerk of this court, all costs accrued in this cause.

It is further ordered, adjudged and decreed, that, in case the said defendants shall make default in the payment of said sums, or any of them, within the time herein limited, then Jeremiah Leahy, who is hereby appointed special master for that purpose shall proceed

forthwith to sell the said ditches, canals, reservoirs, laterals, rights of way and accessories, as an entirety together with so much of the lands hereinabove described as may be necessary to pay the principal, interest and costs, hereinabove mentioned, including the master's fees and costs of sale, provided, however, that the master shall not sell any of said lands separately, unless in his opinion such separate sale can be made without material injury to the parties interested. Such master shall sell said property and premises,
78 at public vendue to the highest and best bidder for cash, after first giving public notice thereof by publication in some daily or weekly paper published in said county of Colfax, once a week for four successive weeks, stating the time and place of such sale, and the terms thereof. The complainant, Patrick P. Ford, may become a purchaser at said sale, and in that event, and in the event that he has not then assigned or otherwise parted with his interest in this decree, his receipt shall be accepted by the said master in lieu of cash, for such amount as would be payable to him by the master, under the terms thereof. Upon making such sale the said master shall execute a deed to the purchaser for the property and premises so sold, and the purchaser at said sale shall be promptly let into possession of the property and premises by him so purchased, upon production of the master's deed therefor.

It is further ordered, adjudged and decreed, that, out of the proceeds of such sale, the said master shall pay:

First. The costs of sale, including a reasonable fee to said master.

Second. All costs accrued in this cause shall be paid to the clerk of the court, including the sum of one thousand dollars ($1,000.00), allowed as plaintiff's attorney fee and to be taxed as part of the costs of this case.

Third. To the clerk of this court, subject to the further order of the court, the sum of three thousand dollars, (3,000.00).

Fourth. To the plaintiff, Patrick P. Ford, or his solicitor, the residue of the proceeds of such sale, not exceeding the sum of nineteen thousand and ninety-seven dollars and seventy-five cents, ($19,097.95); together with interest on the principal sum of $22,097.65, from the date of this decree to the date of sale.

Fifth. The surplus, if any, resulting from such sale, after the payment of the several items hereinabove mentioned, shall, without delay, be paid to the clerk of this court, subject to the further order of the court.

And the said master shall report his doings in the premises to the court, and in the event of a deficiency in the proceeds of such sale, said master shall report to the court the amount of such deficiency.

A copy of this decree, duly certified by the clerk of this court, under the seal of this court, shall be sufficient authority to the master herein designated, to proceed to sell the property, lands and premises herein described, in accordance with the terms hereof.

It is further hereby ordered, adjudged and decreed, that the lien of the plaintiff upon the property, lands and premises herein described, dates from and relates to the date of the commencement of the work described in the bill of complaint, to wit: November 1,

1888, and that, in default of payment by the defendants here-
79 inabove named as in this decree required, the Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, the Springer Land Association, a corporation of the Territory of New Mexico, the Maxwell Land Grant Company, a corporation, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter and Frank Springer, trustees of the said Maxwell Land Grant Company, acting under the name, style and title of the board of trustees of the Maxwell Land Grant Company, and each of them, and all persons claiming by, through or under them, by virtue of the rights acquired subsequent to November 1, 1888, stand absolutely debarred and foreclosed, of and from all equity of redemption, of, in and to so much of the property, lands and premises, hereinabove described as shall be sold as aforesaid by virtue of this decree.

And whereas, one Henry Dargel has instituted suit in this court against the Springer Land Association and others, the same being cause No. 1271 on the docket of this court, wherein said Henry Dargel claims, that, as a subcontractor under the plaintiff herein, he is entitled to a lien upon the premises in this decree described, to the sum of twenty-two hundred and seventy-nine dollars and thirty cents ($2,279.30), with interests and costs.

Now, it is hereby ordered, that the fund of three thousand dollars ($3,000.00), to be paid to the clerk of this court, as herein provided, shall by said clerk be held until the determination of said suit, at which time either party hereto may apply to this court for further orders in relation thereto. Provided, however, that if, at any time, the plaintiff herein, Patrick P. Ford, shall file with the clerk of this court the receipt of said Henry Dargel, or of his solicitor of record, showing the payment and discharge by the said Patrick P. Ford, of the said claim of the said Henry Dargel, with evidence that said lien claimed by said Henry Dargel has been cancelled or released of record, then the clerk of this court shall pay over to the said Patrick P. Ford, or his solicitor, the entire amount of said fund of three thousand dollars.

It is also hereby ordered, that all further orders and decrees in the premises be reserved until the further order of this court.

JAMES O'BRIEN,
Chief Justice, etc.

Dated, March 28, 1893.

District Court, Fourth Judicial District, Territory of New Mexico, County of Colfax.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

80 Now come the defendants in said cause, before the enrollment of the final decree herein, and each for himself objects and excepts as follows:

First. To the action of the court in failing to strike out and suppress upon motion made for that purpose before the final argument of said cause, those certain portions of testimony in said cause to wit:

In the testimony of Edward H. Kellogg the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of Henry Wood, the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of William E. Cole the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of William J. Tewkesbury the questions and answers to the questions which were objected to by defendants on the taking of the direct testimony of said witness.

In the testimony of Peter J. Murphy the questions and answers to the questions which were objected to by defendants on the taking of the direct testimony of said witness.

In the testimony of Patrick P. Ford the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of Frank W. Wood the questions and answers to the questions which were objected to by defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Charles N. Barnes the questions and answers to the questions which were objected to by the defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Roy Tewkesbury the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of A. C. Barnes the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of William L. Johnson, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of C. C. Strawn, the questions and answers which were objected to by the defendants on the taking of the cross and recross testimony of the witness.

In the testimony of K. E. Booth, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

81 In the testimony of William J. Tewkesbury, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of Henry Sturges, the questions and answers to the questions which were objected to by the defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Levi S. Preston, the questions and answers to the questions which were objected to by the defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Michael Keenan, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of Robert H. Cowan, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of Charles Springer, the questions and answers to the questions which were objected to by the defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Jerry Leahy, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of M. W. Mills, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of John R. Griffin, the questions and answers to the questions which were objected to by the defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of James B. Griffis, the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of John Keily, the questions and answers to the questions which were objected to by the defendants on the taking of the direct testimony of said witness.

In the testimony of Edward Sullivan, the questions and answers to the questions which were objected to by the defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of Robert A. McConnell the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of Alonzo M. Wells, the questions and
82 answers to the questions which were objected to by defendants on the taking of the direct testimony of said witness.

In the testimony of Patrick P. Ford, the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of M. P. Pels, the questions and answers to the questions which were objected to by defendants on the taking of the direct testimony of said witness.

Second. To the finding of facts made by the court and to each finding separately, for the reason that the same is not supported by the evidence, and much objection and exception is made to the findings numbered I, also findings II, III, etc., to XLIII.

Third. To the conclusions of law found by the court and to each conclusion separately for the reason that the same is not supported by any legal, competent or material testimony and is not the law of the case, and such objection and exception is made to the conclusion of law numbered II, etc., to IV.

Fourth. Said defendants and each of them also separately object and except to the conclusion of the court as to the facts established by the evidence and to the conclusions of law reached by the court

Fifth. To all the findings of facts and conclusions of law filed in said cause on the following grounds. (*a*) Because the same were filed on the day of filing the final decree in said cause and no copy of the same was served on defendants' solicitors. (*b*) Because no time or opportunity was given to defendants' solicitors to be heard on objections to such findings, until after enrollment of the decree in said cause.

Said defendants and each of them separately object and except to the decree filed and enrolled in said cause both as to substance and form, as follows:

First. Because there was no opportunity for said defendants to be heard on the draft of said decree, before enrollment of the same, or to move for a rehearing or modification.

Second. Because said decree operates as a personal judgment against each of said defendants.

Third. Because said decree is not supported by sufficient evidence and is not warranted by the evidence in the case.

Fourth. Because said decree is excessive in amount.

Fifth. Because said decree is erroneous in affixing a lien upon the 22,000 acres of land described in the decree as being appurtenant to the ditches and reservoirs described in the bill of complaint.

83 Sixth. Because said decree is erroneous in establishing any lien whatever on the real estate and ditch and reservoir system described therein.

Seventh. Because said decree is erroneous in providing that the master shall not sell any of said lands separately, unless in his opinion such separate sale can be made without material injury to the parties interested.

Eighth. Because said decree is erroneous in failing to require the master to sell the said lands in separate parcels, so far as the same could be done without injury to the parties interested.

Ninth. Because said decree is erroneous in this, it recognizes the duty of the complainant under his contract to remove all liens on the property in question, and yet gives him foreclosure of his lien before such other liens were removed.

Tenth. Because the decree is erroneous in requiring execution to issue as in the decree provided.

Eleventh. Because said complainant is not legally or equitably entitled under the laws and the evidence of this case to the relief granted him in said decree.

Twelfth. Because the decree is erroneous in not limiting the lien established by the court to the improvement, ditches, dams and reservoirs constructed together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof.

The foregoing objections and exceptions to said findings of facts and conlusions of law and decree were taken orally in open court at the time the court announced and signed said findings and decree in this cause, and leave was then and there given to defendants' solicitors to make and file such objections and exceptions specifically in writing with the same force and effect as if made in writing, and

filed at the moment of announcing such findings and decree and before the enrollment of said decree and the same are now made of record as of said time and as of date March 28th, 1893.

JAMES O'BRIEN,
Chief Justice, etc.

84 TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court for the Fourth Judicial District, Sitting within and for the County of Colfax, Territory of New Mexico.

PATRICK P. FORD, Plaintiff,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock; The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company, a Corporation; Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Defendants. } Chanc'y. No. 1301.

Now comes the said several defendants in the above-entitled cause by their solicitors, and apply to this honorable court to allow them an appeal to the supreme court of the Territory of New Mexico from the decree made and entered in said cause, and dated March 28th, 1893, and to fix the amount of bond to be given by or for said appellants to stay the execution of said decree pending such appeal.

LONG & FORT,
A. A. JONES,
FRANK SPRINGER,
Solicitors for Defendants and Appellants.

On reading and filing the foregoing application it is ordered, that an appeal in said cause to the supreme court of the Territory of New Mexico be allowed as prayed for, and that execution of the said decree be stayed pending said appeal upon the appellants or some person or persons for them giving a bond on or before the 26th day of June, 1893, in the sum of thirty thousand dollars with sufficient sureties to be approved by this court or the judge thereof, conditioned as provided by the statute in such cases.

JAMES O'BRIEN,
Chief Justice, etc.

Las Vegas, N. M., March 28th, 1893.

And afterwards, to wit, on the 26th day of June, 1893, there was filed in said clerk's office a bond in the sum of thirty thousand dollars, which said bond was duly approved by the judge of said court.

85 And afterwards, at a regular term of the supreme court of the Territory of New Mexico begun and held at the city of Santa Fé, the seat of government of said Territory, on the last Monday in July, 1894, on the sixteenth day of said term, the same being Friday, August 17, 1894, the following, among other, proceedings were had, to wit:

PATRICK P. FORD, Appellee, *vs.* SPRINGER LAND ASSOCIATION *et al.*, Appellants.	554.	Appeal from District Court of Colfax County.

This cause, coming on for hearing upon the transcript of record, assignments of error, and briefs of counsel on file, is argued by E. V. Long, Frank Springer, and A. A. Jones, Esquires, for appellants, and J. F. Vaile, Esquire, for appellee, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, at a regular term of the supreme court of the Territory of New Mexico begun and held at the city of Santa Fé, the seat of government of said Territory, on the last Monday in July, 1895, on the twenty-seventh day of said term, the same being Wednesday, August 28, 1895, the following, among other, proceedings were had, to wit:

PATRICK P. FORD, Appellee, *vs.* SPRINGER LAND ASSOCIATION *et al.*, Appellants.	554.	Appeal from Colfax County.

This cause having been argued by counsel and submitted to and taken under advisement by the court at a former term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Laughlin, Chief Justice Smith and Associate Justice Collier concurring, affirming the decree of the court below and remanding this cause to the court below with directions to make such order as will carry the same into effect. It is therefore ordered, adjudged, and decreed by the court that the decree herein of the district court in and for the county of Colfax be, and the same hereby is, affirmed, and that this cause be, and the same hereby is, remanded to said district court with directions to make such order as will carry the same into effect; and it is further considered and adjudged by the court that the said appellee do have and recover of the said appellants his costs in this be-
86 half expended, as well in the court below as in this court, to be taxed, and that he have execution therefor.

And afterwards, to wit, on the 23rd day of October, 1895, there was filed in the office of the clerk of said supreme court a motion for an appeal in the said cause; which said motion is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, at the July Term, A. D. 1895.

PATRICK P. FORD, Complainant and Appellee,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. Barnes, Melville W. Mills, William J. Tewkesbury, Frederick J. Eames, William A. Comstock; The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company, a Corporation; Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Defendants and Appellants.

The above-named defendants and each and all of them, conceiving themselves aggrieved by the decision and judgment of the said supreme court made and entered in the above-entitled cause on the 19th day of August, 1895, affirming the judgment of the district court herein, do hereby at the same term of said court appeal from said judgment to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was entered or so much thereof as may be necessary to a review of said judgment may be sent to the Supreme Court of the United States; also that this court will fix the amount of the supersedeas bond to be given by said appellants, in order that execution of said judgment may be suspended until the decision of said Supreme Court of the United States upon said appeal may be had.

LONG & FORT,
FRANK SPRINGER,
Solicitors for Appellants.

And afterwards, at the regular term of said supreme court of the Territory of New Mexico last aforesaid, on the forty-second day thereof, the same being Wednesday, October 23, 1895, the fol-
87 lowing, among other, proceedings were had, to wit:

PATRICK P. FORD, Appellee,
vs.
THE SPRINGER LAND ASSOCIATION *et al.*, Appellants. } 554. Appeal from Colfax County.

And now, to wit, on October 23rd, 1895, it is ordered that the appeal in the above-entitled cause be, and the same hereby is, allowed,

as prayed for, in open court, and it is further ordered that the sum of the supersedeas and appeal bond to be given by said appellants is fixed at five hundred dollars, and that upon the filing of bond in said sum, with sureties, to be approved by the chief justice of this court, in the usual form execution of the judgment appealed from and further proceedings thereunder be suspended till the decision thereon by the Supreme Court of the United States.

THOMAS SMITH.
Chief Justice.

PATRICK P. FORD, Appellee,
vs.
THE SPRINGER LAND ASSOCIATION *et al.*, Appellants. } 554. Appeal from Colfax County.

The defendants in the above-entitled cause on this day come and pray the court to make and certify a statement and findings of the facts established by the evidence in said cause, which is accordingly done.

THOMAS SMITH,
Chief Justice.

And afterwards, to wit, on the 23rd day of October, 1895, there was filed in the office of the clerk of said supreme court of New Mexico an appeal bond in said cause; which said bond was and is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1895.

PATRICK P. FORD, Appellee,
vs.
THE SPRINGER LAND ASSOCIATION *et al.*, Appellants. } No. 554.

(Appeal from Colfax county.)

Know all men by these presents that we, William J. Tewkesberry, of the county of Cook and State of Illinois, and Frank Springer, of the county of San Miguel and Terrritory of New Mexico, are held and firmly bound unto the above-named Patrick P. Ford in the sum of five hundred dollars, to be paid to the said Patrick P.
88 Ford; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of October, A. D. 1895.

Whereas the above-named defendants and appellants, The Springer Land Association and The Maxwell Land Grant Company, are about to prosecute an appeal to the Supreme Court of the United States to reverse the decision and decree rendered in the above-entitled cause by the above-named court at the present term thereof, on, to wit, the 28th day of August, 1895:

Now, therefore, the condition of this obligation is such that if the above-named The Springer Land Association and The Maxwell Land Grant Company shall prosecute the said appeal without delay and to effect and answer all damages and costs if they fail to make said appeal good and shall pay and discharge or cause the same to be done, whatever judgment may be rendered in the said Supreme Court of the United States, together with all costs, and abide the judgment of the said court, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

WM. J. TEWKESBERRY. [SEAL.]
FRANK SPRINGER. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Personally appeared before me, the undersigned, a notary public in and for the said county of Santa Fé, the above-named W. J. Tewkesberry and Frabk Springer, obligors on the foregoing bond, and each for himself acknowledged the execution of the same for the uses and purposes in said obligation mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above named.

R. C. GORTNER,
[SEAL.] *Notary Public.*

The above and foregoing bond approved this 19 day of October, A. D. 1895.

THOMAS SMITH,
Chief Justice, &c.

And afterwards, at the term of said supreme court of the Territory of New Mexico last aforesaid, on the forty-third day thereof, the same being Thursday, October 24, 1895, the following,
89 among other, proceedings were had, to wit:

PATRICK P. FORD, Appellee,
vs.
THE SPRINGER LAND ASSOCIATION *et al.*, Appellants. } 554. Appeal from Colfax County.

It is ordered by the court that the supersedeas bond executed by said appellants on appeal from said district court to this court shall be, and the same hereby is, declared to be the supersedeas bond in this cause on appeal from this court to the supreme court of the United States.

And afterwards, to wit, on the 29th day of October, 1895, there *was* filed in the office of the clerk of said supreme court of New Mexico the findings of fact in said cause; which said findings of fact were and are in the words and figures following, to wit:

90 In the Supreme Court of the Territory of New Mexico.

PATRICK P. FORD, Appellee, *vs.* THE SPRINGER LAND ASSOCIATION *et al.*, Appellants.	No. 554. Appeal from Colfax County, District Court.

The court makes the following statement and findings of the facts established by the evidence in the above-entitled cause, to wit:

On the 26th day of October, 1888, the defendant The Springer Land Association entered into a contract with the complainant, Patrick P. Ford, for the grading work in the construction of a certain ditch line and reservoir system for irrigation in Colfax county, New Mexico. Said contract and the specifications made a part of it were in the following terms:

Contract and Specifications for the Cimarron Ditch.

Contract.

This agreement made and entered into this 20th day of October, 1888, by and between P. P. Ford, party of the first part, and the Springer Land Association (by C. N. Barnes, general manager, approved by C. C. Strawn, president) a duly organized association, party of the second part, witnesseth: That for and in consideration of the covenants and agreements hereinafter set forth, the parties hereto mutually agree and bind themselves as follows: The party of the first part agrees to furnish all necessary tools and labor, and perform all the work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance with the specifications hereto attached and made a part of this contract. Said first party agrees to begin work within ten days after signing this contract, and to complete the same on or before July 1st, 1889. The party of the second part agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification. And the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached. It is hereby mutually agreed that as the substance of clause "X" of the specifications, concerning the time in which said work is to be completed, is of vital importance to the company, no extension of time beyond the date fixed shall be asked or granted, except for causes mentioned, and that the failure of the con-
91 tractor to fulfill the obligations herein assumed will work a forfeiture to the company of all the retained percentage accumulated to that date, and shall be considered by both parties in the light of liquidated damages retained by the company through

such failures. In witness whereof, we have hereunto set our hands and seals this 26th day of October, A. D. 1888.

P. P. FORD, [SEAL.]
C. N. BARNES, [SEAL.]
General Managers Springer Land Association.

Approved by—
C. C. STRAWN,
President Springer Land Association.

Specifications.

For the grading of the Cimarron ditch:

1. Gradations.—Under this general head will be included all excavations and embankments required for ditch and reservoirs; all excavations required for foundations of flumes and gates and other structures, and the grading approaches to bridges, as well as any and all kind of grading work incident to the completion of the work herein contemplated.

2. Excavations.—All excavations for ditches will be made to the full width and depth, and for such slopes as shall be indicated by the engineer. Bottom of ditches shall be smoothly dressed to grade, level across, and cleared of all loose stones and other matter, which might make a rough or uneven surface. Slopes will be smoothly dressed to conform to the straight or curved line indicated by the stakes. All excavated material will be classified as earth.

3. Embankments.—Materials taken from excavations will be placed in adjoining embankments as follows: First. The bank on the lower side of the ditch will be built to the full height and width, indicated by the engineer, a beam of four feet width being left between inner top of bank and edge of excavation. Second. The remaining material will be used on level ground to build the bank on upper side. Third. Any excess of material will then be wasted on the outside of lower bank, but never piled in hills on top of bank. The price for excavation includes a free haul of one hundred feet. Material for greater distance will be paid for at the rate of two cents per one hundred feet or fraction thereof in excess of the haul distance.

4. Special embankment.—There will be built across several depressions, to serve as settling basins, and to increase capacity of small reservoirs. They will be built in every case by borrowing material from the inner or water side of the embankment. No borrow pit will be allowed nearer than fifteen feet from the toe of the bank. Material used will be placed in layers not more than ten inches in thickness, driving lengthwise the bank in every case. All banks
92 shall be built to such additional height*h* to compensate for shrinking or settling, as the engineer may direct, with extra charge. The side of these banks will be deeply plowed with parallel furrow, four feet apart, lengthwise of the bank, before filling is begun.

Reservoir No. 7.—The embankment for this reservoir will be as

follows: First. The site will be deeply plowed lengthwise, under strips of four furrows inside each, with spaces of six feet between the strips. Second. On the line marked for the top of the embankment, a trench eight feet wide, and one to four feet deep, will be excavated, the material being placed in the outer side of the embankment. The trench will then be filled with borrowed material, wheel scrapers being used and driven lengthwise. The cost of this preparatory work aside from the yardage of the trench, will be included in the price named for the embankment. All material used in this embankment will be borrowed from the inner or water side, leaving a *beam* of twenty-five feet from the toe. The price named for embankment will include the total haul, as no overhaul estimate will be made. The dimensions of this bank will be as follows: Width on top, twelve (12) feet; inner slope, three (3) feet horizontal to one (1) foot vertical; the outer slope will be one and one-half (1½) to one (1). The greatest height on center line will be twenty-six (26) feet.

5. Borrow.—In case the excavation should fail to furnish sufficient material for adjacent embankment, these will be completed from borrowed pits; no such pits being allowed nearer than fifteen (15) feet from the toe of the embankment. Borrowed material will be measured in embankment, and payed for the same at same rate as other work.

6. All risk of damage or loss to the work from floods or other casualities, will be assumed by the contractor, until his work has been accepted, and no charge for loss or deterioration on this account will be allowed, but a reasonable extension of time may be granted by the engineer.

7. Contractors must carefully perserve all stakes and bench-marks, and persistent destruction of these will involve a charge for resetting.

8. Contractors will not sell, or allow to be sold, any intoxicating liquors on or near the work. Disorderly or quarrelsome persons will be discharged at the request of the engineer. It is specially stipulated that should the contractor or any other person, directly or indirectly connected with the work, establish a store, or commissary so called, for the sale of supplies or other goods to employees, such store or commissary shall be conducted honestly and fairly, and on a plan of strict justice. The company is determined
93 that the practice of defrauding employees through the medium of false or extortionate charges shall not prevail on this work. The right is therefore reserved by the company to absolutely annul this contract as to any uncompleted work at any time on satisfactory and unrefuted proof being rendered. The violation of this rule will be considered a breach of contract, and will work a forfeiture of all retained percentages to that date.

9. Contractors must inform themselves by personal examination as to the nature of the soil, the general features of surface, accessibility and all other matters affecting the contract. The quantities given by the engineer are approximate only, nor will any information furnished by the engineer or his assistants on any of the

above points, relieve the contractor of any part of his obligation to fully complete his work. The contractor will give personal attention to the work.

10. Time.—As the time specified for the final completion of the work herein contemplated is an essential feature of the contract, no extension of time will be granted, provided, however, that should the work be seriously delayed by continuously inclement or hard freezing weather, or the like unavoidable cause, the engineer may, at his discretion, grant an extension of time equal to that so lost. If at any time during the progress of the work the engineer shall judge that the force employed is insufficient to insure its completion within the limit of time stipulated in the contract, he may order an increase of force as will, in his judgment, accomplish the desired purpose, and the contractor, on receiving written notice to that effect, will immediately take the necessary steps to comply therewith.

11. Extra work.—No extra work will be allowed or paid for unless done under written order from the engineer, which order shall bear as an indorsement the agreed price for the same. In case of disagreement between the parties to the contract, as to the intent and meaning of any part of these specifications, such matter shall be referred to the engineer, and his decision shall be final and binding on both parties.

12. Damages.—The contractor will be held strictly responsible for all damages to the property or crops of persons along the line of work.

13. Subcontracts.—Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontractor will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer.

14. All orders of the engineer concerning any part of the work must be promptly obeyed.

94 15. Estimates.—On or about the first day of each current month, the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten (10) per centum retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfil his obligations will work a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate, will only be paid upon satisfactory showing that the work is free from all danger, from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work.

Previous to the making of the last-mentioned contract and on May 1, 1888, the Maxwell Land Grant Company made a contract with C. C. Strawn and associates, who afterwards organized the Springer Land Association, which succeeded to their rights and obligations, by which the Maxwell Company gave to them a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was, among other things, provided that with the view of selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises, to be granted to it by the other party, it agreed to set apart and reserve from sale 22,000 acres of its lands, to be selected by the other party, and give to the other party a certain portion of the proceeds which might be derived from the sale of said lands when sold. These lands were under the proposed ditch system and to be irrigated by it, and by this agreement Strawn and his
95 associates were to expend about sixty thousand dollars, or a sufficient sum, to complete the enterprise on the proposed plan. This contract is found in the record as Exhibit "A" to defendants' answer.

And afterwards, to wit, on January 3rd, 1891, there was filed in said clerk's office, Exhibit "A," to the answer of the defendants, which said Exhibit "A" is in words and figures as follows, to wit:

EXHIBIT "A."

This agreement, made on this, the first day of May, A. D. 1888, by and between Harry Whigham, of Raton, New Mexico, as receiver of the Maxwell Land Grant Company, and approved by M. P. Pells, as agent of the income bondholders of the Maxwell Land Grant Company, party of the first part, and C. C. Strawn, of Pontiac,
96 Ill.; W. L. Johnson, of Chicago, Ill.; M. W. Mills, of Springer, N. M., and such other persons as they may associate with them, which persons will hereafter, by a separate writing, make themselves parties to this contract, parties of the second part:

Witnesseth, that, whereas, on the 18th day of August, A. D. 1885, by the order of the district court of the first (now the fourth) judicial district of the Territory of New Mexico, sitting within and for the county of Colfax, made and entered in a certain action therein pending wherein Thomas J. Wright and others were complainants, it was, among other things, ordered and decreed that he, the said Harry Whigham, be appointed to receive the rents and profits of the real estate, freehold and leasehold, and to collect and get in the personal estate of the said Maxwell Land Grant Company, a certified copy of which order is hereto attached and made part hereof, as Exhibit "A;" and

Whereas, by the further order of said court, made and entered on the 31st day of May, A. D. 1887, it was further ordered, adjudged and decreed that the said Harry Whigham, as such receiver, be authorized to sell and execute deeds for the lands within the outboundaries of the tract of land known as the Beaubien & Miranda, or Maxwell land grant, situated in the Territory of New Mexico and

the State of Colorado; provided, however, that such deeds, before being delivered, shall be approved by the said M. P. Pells, as agent of the income bondholders of the said Maxwell Land Grant Company, as aforesaid, and that such deeds shall receive the approval of the said district court, a certified copy of which last order is hereto attached and made part hereof, as Exhibit "B;" and

Whereas, the contract heretofore made between the said Harry Whigham, receiver, and the said M. W. Mills, of date December 1st, 1887, of and concerning about seventy thousand (70,000) acres of the land hereinafter mentioned, has been mutually surrendered and cancelled by the parties thereto, and is by these presents cancelled, set aside and abrogated; and

Whereas, the party of the first part, with a view of selling at an enhanced value certain lands, amounting to about twenty-two thousand (22,000) acres, lying east of the Ponil river, north of the Cimarron river, and west of the right of way of the New Mexico & Southern Pacific Railroad Company, and within the outboundaries of that portion of said land grant situate in the county of Colfax, in the Territory of New Mexico, and being duly authorized in the premises by said orders of said court, has projected a plan for the construction of large irrigating canals, ditches and reservoirs attached thereto, which said canals, ditches, reservoirs, are estimated,
97 in the judgment of experts, well qualified to make such estimates, who have carefully surveyed the same, to cost about fifty-six thousand dollars ($56,000.00); and

Whereas, the party of the first part is also desirous of and is duly authorized in the premises by said orders of said court, to dispose of other lands within that part of said land grant, within the Territory of New Mexico, lying in a body, and containing in all one hundred and ten thousand (110,000) acres, more or less, of unsold lands, bounded on the north by the line dividing townships numbers twenty-eight (28) north and twenty-nine (29) north, ranges numbers twenty-three (23) east and twenty-four (24) east, United States surveys, and bounded on the east by the east line of said land grant, and bounded on the south by the south line of said land grant, and bounded on the west by the line of the right of way of the New Mexico & Southern Pacific Railroad Company, (commonly called the Atchison, Topeka & Santa Fe Railroad Company); and

Whereas, the parties of the second part are desirous of engaging in the enterprise of developing and selling all the lands above described, and for that purpose have viewed the lands and investigated the circumstances and conditions appertaining to the same:

Now therefore, in consideration of the surrender and cancellation of the said Mills contract, as aforesaid, and the further consideration of the obligations hereinafter mentioned, to be kept and performed by the said parties of the second part, the said party of the first part agrees to and with the said parties of the second part, that he will reserve, set apart and hold from sale, except as hereinafter provided, said twenty-two thousand (22,000) acres of land under the ditch system hereinafter provided; provided, however, that the said party of the first part hereby reserves to the said Maxwell Land Grant

Company and its successors and assigns, out of the said tract of twenty-two thousand (22,000) acres, two thousand (2,000) acres under said ditch system, with a perpetual right to the use of the water of said ditches for the same without compensation, but otherwise upon the same terms and conditions as made to purchasers herein to be first selected in sections numbers twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty-three (33), and thirty-four (34), in township number twenty-six (26) north, range number twenty-one (21) east, of the second guide meridian east in the county of Colfax and Territory of New Mexico, for the sole benefit of the Maxwell Land Grant Company, without compensation; and, provided, further, that the parties of the second part shall within thirty (30) days after said ditch system has been finally located and the detail plans and specifications thereof have been completed
98 and submitted for the execution of the work, select lands under the said ditch system until they have selected the full amount of twenty thousand (20,000) acres from any lands under said ditch system, whether the same be east or west of the said right of way of the New Mexico & Southern Pacific Railroad Company, for their disposal, as herein provided:

And, the party of the first part in further consideration of the covenants herein to be kept and performed by the parties of the second part, does also agree to grant and convey by a proper instrument in writing, to a trustee to be appointed by the parties hereto, who shall hold the franchise for the joint benefit of both parties to this agreement, and issue certificates of ditch ownership as hereinafter provided, the right to take all the water which may flow in the Cimarron river at and below the mouth of the Ponil river, excepting so much thereof as may be held to legally belong to the vested right of any person or persons having lands on the stream below, and without prejudice to the water rights or privileges now in use of any person or persons holding or claiming, rightfully or wrongfully, as the case may be, lands of the said Maxwell Land Grant Company or its predecessors, and the grantees of said persons on said Cimarron and Ponil rivers and their tributaries, above the mouth of the said Ponil river:

And, in consideration of the herein-described valuable rights and privileges granted by the party of the first part, the parties of the second part hereby agree to provide without delay, the sum of sixty thousand dollars, ($60,000) or so much thereof as may be necessary, and to use the same in constructing in a good and workmanlike manner, the system of canals, ditches and reservoirs, upon the lands indicated by Exhibits "C" and "E" hereafter made a part hereof, and according to the detail plans and specifications, to be hereafter prepared by E. H. Kellogg, C. E., who is hereby mutually chosen and appointed by the parties of the first and second parts, as the engineer to superintend and approve the construction of said system of canals, ditches and reservoirs, and which detail plans and specifications shall be in harmony with, and not exceed the plans indicated in the transcript from the report and sectional plat of said E. H. Kellogg, hereto attached and made part hereof; as Exhibits

"C" and "E:" The work of constructing said canals, ditches and reservoirs to be at the sole and exclusive cost and expense of the parties of the second part, and the same to be commenced on or before the 15th day of July, A. D. 1888, and completed within six (6) months from that date, or as soon thereafter as the same can be well, properly and economically done when vigorously prosecuted, considering the nature of the work and the character of the season; and, provided, the construction of the said canals, ditches and reservoirs shall not cost to exceed said sum of sixty thousand dollars ($60,000):

99

And, the parties of the second part, further agree that they will at their own and sole cost and expense, use their best efforts to sell all of said twenty thousand (20,000) acres of land coming under said canals, ditches and reservoirs to purchasers for *bona fide* cultivation, settlement or occupancy, only in alternate sections, so far as it may be practicable and expedient so to do, and that all the same shall be sold at the earliest time hereafter possible, in accordance with the terms of this agreement, by the parties of the second part, for not less than one-fifth ($\frac{1}{5}$) in cash in hand at time of sale, the balance due to be paid in not exceeding ten (10) annual installments, each evidenced by two (2) promissory notes for the deferred payments, bearing seven (7) per cent. interest annually, each note to be for one-half ($\frac{1}{2}$) of any such annual deferred payment, and each note to be secured by a trust deed containing full, adequate and ample powers of sale in case — default in payment by the purchaser or purchasers, of any installment of principal or interest running to a trustee, to be mutually agreed upon and appointed hereafter, as the mutual trustee of the parties of the first and second parts, or the holder or holders of such promissory notes so secured as aforesaid, and a sufficient deed in fee-simple with full covenants of warranty of the premises sold, free and clear of all liens and incumbrances, except as to the reservations herein specified, and delivered to the purchaser or purchasers by the party of the first part, upon receipt by said trustee of *of* the said cash payment, and the execution and delivery by the purchaser or purchasers of the notes evidencing the deferred payments, and the trust deed securing the payment of the same with interest as aforesaid, and each cash payment and the said notes evidencing the said annual and deferred payments to be immediately distributed and delivered one-half ($\frac{1}{2}$) of the cash payment, and one (1) of the notes, evidencing one-half ($\frac{1}{2}$) of each annual deferred payment, to the party of the first part, the other one-half ($\frac{1}{2}$) of the cash payment, and the other of the notes evidencing one-half ($\frac{1}{2}$) of each annual payment to the parties of the second part to this contract, at the time of the receiving of said cash payments, and the taking of the said notes secured as aforesaid; the objects and purposes of the parties to this contract being, that, the parties of the first and second parts, shall each share equally in the proceeds of the sales of said lands, under said ditch system, and that the equal share of each party shall be received by each party at the time of the transaction as aforesaid.

And it is also mutually agreed between the parties hereto

that as each annual payment becomes due, each party, or in
100 case of the assignment of the notes so due and unpaid, then the holder of such note or notes shall have the right to demand and receive payment of the same, and in case of default in such payment to require the trustee to proceed to collect any such defaulted note or notes with the costs, attorneys' fees and damages named in said trust deed, by foreclosure of such trust deed and enforcement of the powers of sale therein contained for the use and benefit of the holder or holders of any such defaulted note or notes, and when collected said trustee shall immediately pay the amount of collection to the holder or holders of such defaulted note or notes, less such portion of said costs, attorneys' fees and damages as may be stipulated between such holder or holders of such defaulted note or notes and such trustee, shall be retained by such trustee as his compensation in the premises;

And, it is further mutually agreed between the parties hereto, that none of the lands under said irrigating ditch system shall be sold for less than the average price of fifteen dollars ($15.00) per acre, including the perpetual water privilege from said ditch system; provided, that if after such ditch system shall have been completed and the water turned in and the extent of the utility of the same demonstrated or ascertained, it shall be found that said land, notwithstanding the use of vigorous efforts upon the part of the parties of the second part will not sell at said average price of fifteen dollars per acre, then the parties to this contract shall mutually fix upon a less price for which said lands may and will sell in the market, and the party of the first part in such event having the preference to purchase at such mutually reduced price;

And, it is further mutually agreed between the parties hereto, that the party of the first part and the parties of the second part shall each pay one-half ($\frac{1}{2}$) of all the taxes lawfully assessed on the total valuation of all the unsold lands remaining from time to time, and that each party shall also pay one-half ($\frac{1}{2}$) of all the taxes that may be lawfully assessed upon any interest they may have remaining from time to time in said irrigating plant, including canals, ditches and reservoirs, if it shall be found that the same is lawfully assessable for taxation as independent and separate from the realty enhanced in value by the same;

And, it is further mutually agreed between the parties hereto, that the following perpetual rights and reservations, without compensation as to any of them, be and forever remain to and with the said The Maxwell Land Grant Company, which perpetual rights and reservations shall be contained in all deeds to all purchasers as covenants upon such purchasers and their grantees, running with the land:

101 First. The use of sufficient water from all streams, canals, ditches and reservoirs, for town, city and manufacturing purposes, excepting water power;

Second. Sufficient water for cattle, horses and other stock, with necessary access and right of way thereto along the said streams, canals, ditches and reservoirs and all of them, such access and

right of way to be, as soon as may be hereafter designated, with the view to as little inconvenience as possible to actual cultivators, settlers and occupants. The parties of the second part, or the grantees of the said land under this contract, to receive notice of such access and right of way from the party of the first part:

Third. The exemption of the said The Maxwell Land Grant Company from liability to damages by the cattle, horses or other stock of said company to crops upon any and all of the aforesaid lands:

Fourth. All the cement-rock rights heretofore granted to the Springer Cement Company on the lands aforesaid:

Fifth. Twenty (20) feet on each side of each section line east and west and north and south, through said lands, to be dedicated to the public as right of way for public highways; also, twenty (20) feet on the lower side of all canals and ditches and around all reservoirs herein mentioned, to be used by superintendents and workmen and others in repairing said canals, ditches and reservoirs, and in superintending the same. Also, one hundred and twenty-five (125) feet on either side of the section line east of the township line between ranges numbers twenty-one (21) and twenty-two (22), to be used by the Maxwell Land Grant Company as a cattleway; also, one hundred and twenty-five (125) feet of land on either side of the section line two (2) miles east of the township line dividing ranges numbers twenty (20) and twenty-one (21) east, to be used by the said company for the same purpose. Said cattleways run north and south, and are to run through any of the lands selected under this contract which may be located on said section lines:

And, it is further mutually agreed between the parties hereto, that the following perpetual rights and reservations not to be incorporated in deeds to purchasers under this contract shall be and forever remain to and with the said Maxwell Land Grant Company, without compensation from said company:

The right to graze on any and all the lands remaining unsold on both of the tracts referred to herein, viz., the tracts including one hundred and ten thousand (110,000) acres and the twenty thousand (20,000) acre tract:

It being estimated that the capacity of the said irrigating
102 system, ditching and reservoirs may ultimately be equal to serve thirty thousand (30,000) acres, it is hereby mutually agreed that the parties of the second part shall on or before the 1st day of October, A. D. 1889, have the option to select seven thousand (7,000) acres more of land from the adjacent unsold lands of the Maxwell Land Grant Company, suitable for irrigation, and if the parties of the second part shall exercise such option, then the party of the first part shall reserve such selected lands for the use of the parties of the second part upon the same terms as they take the lands under the said ditch system. Provided, if at the expiration of five (5) years from the date hereof, the parties of the second part shall elect to expend an additional sum of twenty-one thousand dollars ($21,000) in increasing the supply of water service of said system, by the building of storage reservoirs on the upper courses of

the streams, or by other methods equally serviceable and mutually approved by the parties hereto, then said parties of the second part shall have said seven thousand (7,000) acres of land, and otherwise not:

And, it is further mutually agreed, that every purchaser of land under said ditch system, shall have conveyed to him by proper certificate of ownership, a perpetual right running with the land purchased in the canals, ditches and reservoirs of said system in such proportion as thirty thousand (30,000) acres bears to the whole water supply, (it being estimated that thirty thousand (30,000) acres may be the ultimate capacity of said ditch system), that is, if such purchasers should buy one hundred acres of land he would be entitled to a one three-hundredth ($\frac{1}{300}$) part of all the water, and a like interest in all the plant, of said system, except that the ice which may form upon said reservoirs, is hereby forever reserved, to the parties of the first and second part, in equal shares, which mutual reservation shall also be incorporated in the deeds to all the purchasers:

And, it is further mutually agreed, that all purchasers of land under said ditch system, be further required to pay in the proportion specified in the last preceeding paragraph all repairs on said canals, ditches and reservoirs as the same may be from time to time required for the perfect maintainance and the preservation of such canals, ditches and reservoirs, and also to pay all taxes, in the same proportion, that may be lawfully assessed upon the said canals, ditches and reservoirs, and the right of way and the franchise thereof, if in law any such taxable franchise shall be found to exist:

And, it is further agreed, between the parties hereto, that such purchasers shall not receive their certificate, or be entitled to vote their interest in said ditch system, until their land shall be fully paid for.

103 And, it is further agreed between the parties hereto, that if the construction of the canals, ditches and reservoirs mentioned, should at the completion be found to cost less than sixty thousand dollars ($60,000), and that after such complete construction it should be satisfactorily shown that these canals, ditches and reservoirs were of insufficient capacity to give water service for twenty-two thousand (22,000) acres, within three (3) years after such complete construction, then the parties of the second part, shall invest such unused part of the said sixty thousand dollars ($60,000), in constructing such further ditches, reservoirs or reinforcements to the same as may be necessary to bring the whole of the twenty-two thousand (22,000) acres under sufficient irrigation:

(5.) As to the one hundred and ten thousand (110,000) acres, more or less, of unsold lands embraced within the boundaries hereinbefore described, in consideration of the agreements and obligations of the parties of the second part hereinafter contained, it is covenanted and agreed on the part of the party of the first part, that he will set over and deliver, and he does hereby set over and deliver, to the parties of the second part, the said one hundred and ten thousand (110,000) acres, more or less, except such part thereof, as may come under the said ditch system, and be selected by the

parties of the second part, as provided in the first section of this contract, for the sale upon the terms and conditions hereinafter stated, and in consideration of the covenants and agreements contained in the last preceding paragraph, and hereinafter contained, on the part of the party of the first part, the parties of the second part hereby covenant and agree that they will use their best endeavors to sell and dispose of said one hundred and ten thousand (110,000) acres, more or less of land, less the exception therefrom aforesaid, and that they will immediately upon the execution of this contract, set about, and undertake the sale and disposal of said last-mentioned lands, and that hereafter they will continue to contribute their best efforts, skill and ability so to do, until the whole of said lands are entirely sold and disposed of, as best may be under the following terms, conditions and restrictions, that is to say:

The average grade price per acre of all of the lands south of the north line, of township number twenty-six (26) running east and west, through said one hundred and ten thousand (110,000) acre tract, shall not be less than two dollars and fifty cents ($2.50) per acre, and the average grade price per acre of all the lands north of said north line of said township, shall not be less than three dollars ($3.00) per acre, and out of the proceeds of all said sales, the party of the first part, shall at the time of each sale receive the average grade price of the particular tract out of which the particular sale is made, and one half (½) of the gross sum realized above these average grade prices, and the parties of the
104 second part shall also at the time of each sale, receive and have to and for their own exclusive use and benefit the other one-half (½) part of said gross sum above said average grade prices realized from such sales; and if said tracts of lands shall be subdivided and sold in small tracts (as it is understood will be done so far as may be practicable and consistent with the objects of this contract), the prices per acre are to be so averaged and placed on the uplands and on the bottom lands of said two last-named tracts, severally, that the said party of the first part, will be enabled to realize the said average grade prices on said tracts, severally excepting such portion or portions thereof, as may be under said ditch system, and selected by the parties of the second part, under the first section of this contract; and if the better subdivisions of said tracts of land shall first be sold and disposed of, it shall be at prices sufficiently in advance of said several average grade prices, so as to insure the sale of the remaining and poorer subdivisions, or portions of said several tracts at a price that will realize to the party of the first part, said average grade prices severally: and the lands in said several tracts, shall be sold free and clear of all liens and incumbrances for cash in hand, or part cash and the balance in deferred payments, bearing interest at the rate of seven (7) per cent. per annum, by good and sufficient deeds in fee-simple with full covenants of warranty, and taking from the purchasers promissory notes for said deferred payments with interest at seven (7) per cent., and a trust deed with full powers of sale, securing such notes, the same in detail as is provided for as to the sale of the lands under

the said ditch system mentioned in the first section of this contract; the deeds to such purchasers to be duly executed and delivered by the said party of the first part to the purchasers at the time of payment of the purchase price in cash, or in part cash, which said part cash however, shall never be less than one-fifth ($\frac{1}{5}$) of the whole of the purchase-money, and part notes secured by trust deeds as aforesaid, and the proceeds of such sales shall be distributed among and delivered to the parties of the first and second parts both as to the cash payments and deferred notes in proportion to the interests of the parties hereto in each sale, that is, if one-fifth ($\frac{1}{5}$) part of the purchase-money be paid in cash, then one-fifth ($\frac{1}{5}$) of the average grade price of the tract out of which said sale shall be made, shall first be delivered out of said cash payment to the party of the first part, and the balance then be equally divided, and if the remainder be in ten (10) payments by note, one-tenth ($\frac{1}{10}$) of the remaining four-fifths ($\frac{4}{5}$) of said average grade price or premium sum and one-twentieth ($\frac{1}{20}$) of the remaining unpaid profits shall be put in each of the annual notes to be delivered to the party of the first part, and a series of annual notes shall be delivered to the parties of the second part, each note representing one-twentieth ($\frac{1}{20}$) part of the total of the unpaid
105 profits: And it is hereby mutually agreed between the parties hereto that the person or persons who may be chosen as trustee or trustees under the provisions of this contract as to the lands under said ditch system, shall by virtue of such choosing and appointment be and act as the trustee or trustees for the trust deeds taken from the purchasers of the lands embraced in this section of this contract: And it is further mutually agreed between the parties hereto that the party of the first part shall pay all taxes that may be assessed upon all unsold portions of said tract of land, and that he will bear all necessary expenses of litigation in protecting the said tract of land from encroachment by trespass or by squatters, under whatever right they may claim, and in maintaining the purchaser or purchasers of the same or any part thereof, in full and peaceable possession and complete title of the same, so that possession and title can be given to the purchaser or purchasers free from any lien or incumbrances whatsoever: And the parties of the second part shall in no event become purchasers of said lands or any part thereof, directly or indirectly without the written consent of the party of the first part first had and obtained:

And it is further mutually agreed between the parties hereto, that the said parties of the second part shall bear all expenses of negotiating, disposing of and selling the said tracts of land and all portions thereof, including all expenses of subdividing in smaller tracts than one hundred and sixty (160) acres, of traveling, advertising, commissions of sub-agents making contracts, and all other expenses incident to the sale of said lands:

And it is mutually agreed between the parties hereto, that in the event that the proceeds of the sales of said lands do not exceed five (5) per cent. in excess of said average grade prices per acre upon a fair average market value of all the lands in said tracts severally,

then the party of the first part shall pay such five per cent. to the parties of the second part, upon all sales made at the expiration of each and every three (3) months from the date of this contract and during the continuance thereof, as the total compensation of the parties of the second part in the premises:

And it is further agreed between the parties hereto, that if it shall at any time clearly appear that the lands being sold are of a higher value than the average of the whole value of the lands, the party of the first part shall have the right to withhold from the share of the parties of the second part a sum proportionately equal to what the average value of the remaining unsold lands may be, less than the total average premium price of the particular tract, of said two tracts, in which the sales are made; and the parties of the second part further agree that they will prosecute the sale of said lands vigorously and complete, and conclude the sale of the entire
106 tract at as early a day as practicable under the terms and conditions and restrictions imposed, and that the one-seventh ($\frac{1}{7}$) of the whole body of land in the two (2) tracts, or thereabouts, shall be sold each year, but in no case shall more than one-quarter ($\frac{1}{4}$) of the whole of said two (2) tracts be sold in any one year, and the entire tract be sold and disposed of within six (6) years from the date of this contract, and no part shall be sold at a price less than the market price of these or surrounding lands:

And it is further understood and agreed that to enable the parties of the second part to more effectually carry out the terms, conditions and spirit of this contract, they are hereby duly made, constituted and appointed the agents of the party of the first part to do and perform, in accordance with the terms of this agreement, any and all acts necessary to be done and performed in the premises, in order to carry out the stipulations and agreements herein contained to the true intent, meaning and spirit hereof, hereby confirming any and all acts they may do or cause to be done in conformity with the agreements herein contained:

It is understood and agreed that all the stipulations, covenants and agreements, herein contained and required of the said party of the first part, shall extend to and be binding upon the said party of the first part in his respective official or representative capacity, as also that of M. P. Pells as agent of the income bondholders of the Maxwell Land Grant Company, who approves this instrument, and each of them as herein recited, and shall also include, bind, extend to and mean, as well the said Maxwell Land Grant Company, and as well also the income bondholders of the said Maxwell Land Grant Company, and the heirs, executors, and administrators, successors and assigns of each of them, as fully and completely as if they had been fully mentioned along with the said party of the first part each time hereinbefore:

And wherever, in this agreement, the parties of the second part are mentioned it shall be held as well to refer to and to bind and be for the benefit of each and every one of the said parties of the second part, their heirs, executors, administrators, successors or assigns, the same as though they had been in each and every case herein-

before specifically stated, and wherever the Maxwell Land Grant Company is mentioned herein it shall include its successors and assigns.

In witness whereof the said party of the first part, and also the said parties of the second part have hereunto set their hands and seals on the day and year first above written.

107 The title of the lands at that time and at all times afterwards was and remained in the Maxwell Land Grant Company, except as to the rights acquired by Strawn and associates and their successors in interest under said contract. The same contract constituted Strawn and his associates and successors in interest the agent of the Maxwell Company to the extent of and for the purpose of carrying into effect the spirit and intent of the contract as to the sale of the said lands, but that party, the Springer Land Association, had no other title in the lands than as given by said contract.

Five days subsequent to the making of his grading contract complainant Ford entered into another contract with the Springer Land Association by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of eight thousand dollars, to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch.

The said contract of May 1, 1888, designated one E. H. Kellogg as the engineer to have charge of the construction of said system of ditches and reservoirs. No engineer was named in the contract between Ford and the Springer Land Association of October 20, 1888, but said Kellogg, with the assent of all parties, acted throughout as the supervising engineer.

Ford let subcontracts for portions of the work to McGarvey, Dargle, and Haynes. His contract with Dargle was in the following terms:

108 (Copy.)

COMPLAINANT'S EXHIBIT 17.

L. Griffin, stenographer.

Contract and Specifications for the Construction of a Portion of the Cimarron Ditch.

Contract.

This agreement, made and entered into this 21st day of November, A. D. 1888, by and between Henry Dargel (subcontractor) party of the first part, and P. P. Ford, party of the second part, and approved by E. H. Kellogg, the civil engineer for the Springer Land Association,

Witnesseth: That for and in consideration of the covenant and agreements hereinafter set forth, the parties hereto mutually agree and bind themselves as follows:

The said party of the first part agrees to furnish all necessary

tools and labor, and to do the work of grading on the embankment of reservoir No. seven (7) between station number 36 and station number 40, all in strict conformity to the specifications hereto attached and made part of this contract.

The said party of the first part further agrees to begin said work within one days after signing of this contract, and to complete the same as far as station 33 on or before March 1st, 1888, and to complete the whole on or before May 1st, 1888.

The said party of the second part agrees to pay for the work so done, at the rate of ten (10) cents per cubic yard, as follows: The estimate for the work of each calendar month will be paid by the company on or before the 10th of the month following that in which the work is done: As soon as such estimate is paid, the said party of the second part will pay to the said subcontractor the amount of his subestimates, less 10 per centum retained, as detailed in the specifications.

It is mutually agreed that the amounts of these subestimates will in no case be demanded or paid in advance of the payment of the regular estimate.

Witness our hands and seals this 21st day of November, 1888.

H. DARGEL. [SEAL.]
P. P. FORD. [SEAL.]

Approved:
E. H. KELLOGG.

The contracts with McGarvey and Haynes were of like form and tenor, and were also approved by said E. H. Kellogg. Estimates as provided by the contract of October 20th, 1888, were made by said Kellogg, supervising engineer, from time to time, which were audited and paid by the Springer Land Association up to about May, 1889. Estimate No. 6 was dated April 30, 1889, and showed the amount then due and payable, after reserving ten per cent., to be $5,010.92. The amount of this estimate has never been paid.

On June 13, 1889, the said engineer gave to said Ford a written acceptance of the work and a final estimate, which acceptance and estimate are in the following terms:

109 EXHIBIT "33" T.

Final Estimate.

SPRINGER DITCH,
ENGINEER'S OFFICE, *June* 13, 1889.

I certify that P. P. Ford, contractor, has completed the earthwork on the Springer ditch and reservoirs under his contract, that the same has been accepted by me, and that he is entitled to compensation in final settlement therefor for four hundred and forty-one thousand three hundred and ninety-six (441,396) cubic yards of excavation and embankment.

E. H. KELLOGG, *Engineer.*

Statement.

441,396 cu. yards, at 11c..... $48,553 56

Less am't of previous payments:

Estimate No.	1	$6,081	77
"	2	9,501	74
"	3	6,628	33
"	4	4,381	25
"	5	4,324	02
(Over.)			
Springer Land Ass'n, est. No. 6, not paid		5,010	92
			35,928 03

Am't due and now payable..... $12,625 53

No. —.

P. P. Ford. Final estimate to June 13, 1889, $12,625.53.

The total amount stated to be due to Ford by said engineer's estimates at the date of acceptance of the work by the engineer was $17,636.45. This amount the Springer Land Association refused to audit and pay on the ground that the sum so stated was in excess of the amount due; that the work had not been completed according to the contract; that the engineer's final estimate was erroneous either through fraud, inadvertance, or mistake, because the subcontractors had not been paid the several sums due them on the work by Ford, and that the property was not free from danger from liens, and also that Ford should accept the section of land which he had agreed to accept and which he had previously selected in payment of $8,000 of the amount of such final estimate.

The Springer Land Association procured to be made and properly executed a deed of conveyance by the Maxwell Land Grant Company, which held the title, to Patrick P. Ford, conveying to him the section of land which had been selected by said Ford, and had the said deed present in the hands of an agent of said Maxwell Company on June 19, 1889, when the representative of the Springer Land Association, said Ford, and his subcontractors met for final settlement; said deed to be delivered to said Ford upon payment to the agent of said Maxwell Company by the Springer Land Association of $4,000. The representative of the Springer Land Association had with him at that time, for the purpose of making settlement with Ford, currency and valid checks on a responsible Chicago bank for $17,000. He notified said agent and Ford that he was ready to pay the $4,000 to the agent of the Maxwell Company for the deed if Ford would settle with his subcontractors. Ford examined the deed and made no objection to it. McGarvey, one of the subcontractors then present, claimed that Ford owed him about $4,000, which Ford disputed as to $300.00 of it. Ford would not settle unless McGarvey would accept the amount he admitted and give him a receipt in full, which McGarvey refused to do, and claimed that he had a lien on the ditch and res-

ervoir for the amount of his claim. The agent of the Springer Land Association offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them. No settlement was made between Ford and McGarvey. McGarvey then informed the agent of the Springer Land Association that the work was not done according to contract, upon which the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The said disagreement between Ford and Subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. The representative of the Springer Land Association did not tender to the agent of the Maxwell Company the amount due it upon said deed, and that no sufficient tender of the deed was made to Ford to require him in law to accept it. The amounts claimed by the several subcontractors at that time were as follows:

McGarvey	$4,308 72
Dargle	2,279 00
Haynes	800 00
Lane	150 00
Total	$7,537 72

Thereupon, on July 3rd, 1889, complainant Ford filed his notice of claim of lien for $17,634.27 alleged to be due on the contract, including all moneys due subcontractors at that time and $390.00 for extra work; which notice was as follows:

111 *Copy of Claim of Lien.*

TERRITORY OF NEW MEXICO, }
County of Colfax, } *ss:*

PATRICK P. FORD, Contractor,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock; The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company; Rudolph V. Martensen, Chas. Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Owners or Reputed Owners.

This is to give notice that Patrick P. Ford hereby files this, his claim of lien, as an original contractor, with the county recorder of the county of Colfax, Territory of New Mexico, against all that certain ditch, canal and reservoir, commonly known as the Cimarron ditch and its accessories, the said ditch beginning at a point where the Ponil and Cimarron rivers meet to form the Cimarron, thence continuing in a devious course eastwardly to a point on the Atchi-

son, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax, Territory aforesaid, being in length about 26 miles; and the said ditch and land appurtenant thereto for right of way, being of about the uniform width of sixty feet, together with all lateral ditches and reservoirs, and the land covered by, and appurtenant to the same, as aforesaid, as also twenty-two thousand acres of land appurtenant to said ditch, the said land being also in said county, and under the ditch to be irrigated thereby, and described according to the townships and sections, to wit:

Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east. And sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east, all of which ditch, laterals, reservoirs and lands as aforesaid are plotted and laid out on the plan hereto attached and made a part of this claim of lien, to secure the payment of the sum of seventeen thousand six hundred and thirty-four dollars and twenty-seven cents ($17,634.27), the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said The Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars ($390.00), for extra excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract; all of which having been begun on, to wit, the first day of November, 1888, and prosecuted continuously until the twenty-first day of June last past, the said work being on the said last date then completed and accepted, the same being within ninety days from the completion of said ditch.

The names of the reputed owners of the land hereinbefore mentioned are the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, trustees of said company acting under the name, style, and title of the board of trustees of the Maxwell Land Grant Company.

Claimant was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president.

The terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof.

PATRICK P. FORD.

TERRITORY OF NEW MEXICO, }
County of San Miguel, } ss.:

Patrick P. Ford, being duly sworn, doth depose and say that he is the claimant above named, and that he has read the foregoing

claim of lien, and that the facts therein stated are true, except such facts as are stated upon information and belief, and that as to such facts he believes them to be true.

Witness my hand and seal, at Las Vegas, N. M., the second day of July, A. D. 1889.

CHARLES RUDULPH,
[SEAL.] *Notary Public.*

Commission expires March 23rd, 1892.

112 To said notice was attached a copy of the contract of October 20, 1888, and the specifications.

On July 25th, 1889, Subcontractor McGarvey filed a notice of lien upon the same property mentioned in Ford's claim of lien for $5,000.00, alleged to be due him from Ford upon said work, and he made a second filing for the same claim on August 5th, 1889.

On August 1, 1889, Subcontractor Dargle filed his notice of lien on the same property for $2,279.30.

All of said notices of lien were filed in the office and within the time prescribed by law. Suits were commenced to foreclose these liens as follows:

By Dargle, February 28, 1890.
By Ford, June 30, 1890.
By McGarvey, July 22, 1890.

All of said suits were begun within the time limited by law. Dargle's suit was still pending at the date of the decree in this suit.

It appears by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside of the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and reservoirs—were under said ditch and to be irrigated thereby; that the same were included within the sections described in the notice of lien and bill of complaint. It does not appear that the particular sections described were selected or segregated by the Springer Land Association under its contract of May 1, 1888, as capable of irrigation, and it does appear that in a number of the said sections only portions of the section were selected, because a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch. All of said sections were situated between the line of said ditch and the river and were enhanced in value by reason of its construction.

It appears that complainant Ford paid to his several subcontractors all amounts due them under the first five monthly estimates, but at the time of the commencement of this suit had
113 not paid what was due them under the sixth estimate (May, 1889) nor under the final estimate of June 13, 1889.

The evidence does not sustain the allegations of the cross-bill that complainant, Patrick P. Ford, entered into a fraudulent arrangement with said Kellogg, engineer in charge of said work, or that he was in collusion with said Kellogg as to the amount of work performed by said Ford under said contract, or as to the completion of said work, or that by reason thereof he procured said Kellogg to

make overestimates as to the amount of work done from time to time, or a false and fraudulent final estimate on account of said work, or that said Kellogg entered into a conspiracy with Ford to defraud defendants, or that said Ford combined with said Kellogg or procured him to make a final estimate of said work or to deliver it to said Ford, or that said Kellogg was dishonest or incompetent. As to whether the work was completed according to the contract and specifications there is a vast amount of conflicting expert testimony. The evidence against the proper completion of the work is not sufficient to overcome that of the engineer in charge, and the court finds that acceptance by the engineer in charge, being free from fraud or dishonesty, is conclusive, and that the amount shown by his estimates is correct.

THOMAS SMITH,
Chief Justice, &c.,
Per N. B. L.

114 And be it further remembered that on the 28th day of August, 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico the opinion of the court in said cause, which is annexed hereto in accordance with rule 8 of the Supreme Court of the United States, and is in the words and figures following, to wit:

115 In the Supreme Court of the Territory of New Mexico, at the July Term, 1895.

PATRICK P. FORD, Appellee,
versus
THE SPRINGER LAND ASSOCIATION *et als.*, Appellants.
} Appeal from the District Court, Colfax County.

Statement of the Case.

This is an action in chancery brought by Patrick P. Ford, appellee, against The Springer Land Association and certain individuals corporate thereof, together with the Maxwell Land Grant Company and its trustees, to establish, fix, and foreclose a mechanics' lien upon a certain ditch and reservoir system, rights of way therefor, and certain lands alleged to be appertenant thereto, and it is founded on the following facts:

On October 20th, 1888, a contract was entered into between Patrick P. Ford, of the first part, and the Springer Land Association, of the second part, for doing the earth-work in constructing a certain ditch line and reservoir system for irrigation, all in the county of Colfax and Territory of New Mexico, the provisions of which, so far as pertenent to this case, are as follows:

The party of the first part to furnish all necessary tools and labor and perform all work of excavating and grading required in the construction of the Cimarron ditch and its accessories, said work to be done in a thorough and workmanlike manner and in full

accord with the specifications thereto attached and made part of the contract. * * *

The party of second part agreed to pay said party of the first part for the work so done at the rate of eleven cents per cubic yard for all earth removed, without clas-ification, amounts due for said work to be paid at the time and in the manner described in the specifications thereto attached.

"Specification 13. Subcontracts must be submitted to the engineer and receive his approval before work is begun under
116 them; no second subcontracts will be allowed; subcontractors will be bound by the same specifications as the original contractor and will be equally under the authority of the engineer."

"Specification 15. On or about the first day of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof less ten per centum retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfill his obligations will mean a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate will only be paid upon the satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work."

The land upon which the ditches and reservoirs were to be and were actually located and constructed and upon which the improvements were actually made did not belong to the said The Springer Land Association, or to any of the parties to the contract, or to their successors in interest, so far as appears from the record, but was at the time the property of the Maxwell Land Grant Company, which was not a direct party to the contract. The Maxwell Land Grant Company did, however, make a contract on the first day of May, 1888, with C. C. Strawn and his associates, who afterwards organized the Springer Land Association, by which the Maxwell Company gave it and its associates a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was provided, among other things, that, with the view of selling certain of its lands at an enhanced value and in consid-
117 eration of certain perpetual water rights and franchises to be granted it by the other party, it agreed to set apart and reserve from sale about twenty thousand acres of its lands and to give the other party, the Springer Land Association, which succeeded to the rights of said Strawn and his associates under said contract, a certain portion of the proceeds which might be derived from the

sale of the said lands when sold. These lands were under the proposed ditch system and to be irrigated by it, and by this agreement said Strawn and his associates agreed to expend about sixty thousand dollars or a sufficient sum to complete the enterprise on the proposed plan. The title to the lands at that time and at all times afterwards, so far as appears from the record, was in and remained in the Maxwell Company except as to the rights acquired by Strawn and his associates and successors in interest under said contract. The same contract constituted and made Strawn and his associates and successors in interest the agent of the Maxwell Company to the extent of and for the purposes of carrying into effect the spirit and intent of the contract as to the sale of the said lands; but that party, the Springer Land Association, contracting with the appellee Ford, had no other title in the lands than as given in that contract. Five days subsequent to the time the ditch contract was made Ford entered into another contract with the Springer Land Association, by which he agreed to select and take one section of the land, under the ditch system, at the stipulated price of eight thousand dollars, to be considered as part payment on the contract price for constructing the ditch system, and the Springer Association agreed to procure a deed to Ford from the Maxwell Company free from all incumbrances.

The work of construction proceeded under the Ford contract, and he let subcontracts to McGravey, Dargle, and Haynes. Estimates, as provided by the contract, were made by E. H. Kellog-, the supervising engineer, from time to time, which were audited and paid by the Springer Association up to about May, 1889, and the final estimates were made, including all balance alleged to be due on the contract and for extra work, and presented about the middle
118 of June of that year and at the time the contract work was alleged to have been completed, amounting to $17,634.27, due on the contract, and $390.00 for extra work, and which the Springer Association refused to pay on the grounds that the sum claimed was in excess of the amount due, and that the work had not been completed according to the contract; that the engineer's final estimate was erroneous in part, either through fraud, inadvertance, or mistake and because the subcontractors had not been paid the several sums due them on the work by Ford, and that the property was not free from danger from liens. Thereupon Ford, on July 3rd, 1889, filed his notice of claim of lien for $17,634.27, alleged to be due on the contract, including all moneys due subcontractors at that time, and for $390.00 alleged to be due him for extra work. Thereafter the subcontractors filed their notices of claim of lien on the property for moneys alleged to be due them, McGarvey for $5,000.00, Dargle for $2,274.30, and Haynes for an amount not shown by the record, all of which said notices were filed within the time prescribed by law. Soon thereafter suits were brought to establish and foreclose the several liens by the subcontractors, some of which were pending when this suit was brought, and all against the ditch laterals, reservoirs, and right of way, about sixty feet wide; the full length of the ditch, about twenty-six miles in length, and

against 22,000 acres of land alleged to be under the ditch system and to be irrigated thereby and appertinant thereto.

Ford filed his bill to foreclose the lien so claimed on June 30th, 1890, in which he set out his contract of October 20th, 1888, averred substantial compliance therewith, completion and acceptance of the same, but not by whom accepted; the filing of his claim of lien, the total amount due him at completion thereof, described the property as in the claim of lien, averred as to the contracts between the Maxwell Company, Strawn and his associates, and the Springer Association and its associates; that during all the time the Ford contract was being executed the Maxwell Company and the Springer Association both had full knowledge of the same, and that neither gave any notice that they would not be responsible for it; that at the time of the completion of the work there was due Ford from the Springer Association and the individuals composing it
119 $17,634.27 on the contract and $390.00 for extra work ordered by the supervising engineer in charge, with prayer for an accounting and foreclosure of lien, decree for payment of costs, solicitors' fees, sale of ditches, laterals and reservoirs, and the 22,000 acres of land described, and for a deficiency judgment in case the property when sold should not produce sufficient funds to fully satisfy the several amounts so found to be due against the Springer Land Association and its associates.

The Springer Land Association and the individuals composing it answered the bill and denied that the work was ever completed by complainant or accepted by defendants; denied that they were indebted to the complainant for said work in any sum or that any claim of lien was filed which would be effective to establish a lien on the ditch system or lands described therein; averred that the Maxwell Company owned the lands and had given the Springer Association the right to construct the ditches and reservoirs thereupon, but denied that the 22,000 acres of land *was* to belong to the Springer Association; averred that the final estimates made by the engineer were given for work never done or completed through fraud, negligence, mistake or inattention, or through the fraudulent procurement of the complainant; that under the contract the right to audit and determine the amount to be paid on the engineer's estimates rested with the Springer Association, and that it was not bound to pay on estimates made exclusively by the engineer; that under said contract defendants were not bound to pay final estimates made by the engineer except upon satisfactory showing that the work was free from all danger from liens or incumberances of any kind; that subcontractors had filed liens for about $10,000 against the property, upon some of which suits had been brought and were still pending; that complainant had failed to remove or to take steps to remove or to defend against said liens, by reason of all of which defendants were not bound to pay the final or any other estimates for said work.

These defendants filed a cross-bill, setting up matters averred
120 in the answer and other breaches by complainant Ford and the loss, damages, and expenses to the defendants by reason

thereof, with a prayer that in case an accounting should be decreed under the bill these matters should be considered and allowed as set-offs to Ford's claims and for general relief, but neither the Maxwell Land Grant Company nor any of its trustees filed any answer or other pleadings of any kind. Complainant filed general replication to the answer and answer to cross-complaint, and issue was joined on the general replication of defendants to cross-answer. The cause was then referred to W. E. Gortner, Esq., as special examiner, to take proof and report the same to the court. A vast amount of testimony was then taken, orally and by depositions, and a great number of exhibits were offered, the bulk of which was directed to the question of completion or non-completion of the work in compliance with the term- of the contract and specifications, the erroneous character of the final estimate by the engineer through mistake, inadvertence, or fraud. The record here consists of over twelve hundred closely printed pages.

The taking of proofs was closed and the case set down for argument and was argued before the court in vacation, and on March 28th, 1893, Chief Justice O'Brien rendered his decision in favor of the complainant and made his findings of facts and conclusions of law, and a final decree was thereupon enrolled establishing a lien on the entire ditch and reservoir system and rights of way and on the 22,000 acres of land for $22,097.75, including interest, being the amount claimed in the notice of lien, and which included all sums due him and due on all subcontracts, and out of this amount to pay into court a sum sufficient to satisfy Subcontractor Dargle on his subcontract lien in event that Ford did not pay the amount due to him and file Dargle's receipt in full for same, it then appearing that Ford had settled with all other subcontractors in full, and with interest to run at 6 % from date of decree for the debt, and $1,000 for complainant's solicitors' fees, and for all costs, and for a deficiency judgment in case the proceeds derived from the sale should not be sufficient to pay the several sums so found for complainant
121 against the Springer Land Association and its associates herein named, and for an order of sale and foreclosure; to all of which defendants excepted, and the case is accordingly here on appeal.

Defendants assigned errors sufficient to raise all the material issues in the cause as to its merits.

The cause was ably argued in this court at the July, 1894, term by Frank Springer, Long & Fort, and A. A. Jones, for appellants, and by Wolcott & Vaile, for appellee, and exhaustive briefs were submitted on both sides.

Opinion.

LAUGHLIN, *A. J.*:

This is an action in chancery, the purpose of which is to establish and foreclose a lien in favor of the appellee on the property of the appellants, as described in the notice of lien and in the bill of complaint, and upon the notice of lien the appellee must succeed or fail, and he must show that it is in substantial compliance with all

the material requirements of the law and the facts applicable to the subject.

The law providing protection to mechanics, materialmen, and laborers, by giving them a security on property upon which they have furnished material, labor, and skill for the enhancement of its value, requires nothing unjust to the owner and nothing unreasonable on the part of those who seek its protection in enforcing their remedy under it. Those who attempt to fix a lien and establish an incumbrance on property for the security of their just debts and demands, and thereby compel the owner to pay these obligations, which in many instances they never directly contract, must show affirmatively a substantial compliance with all the essential requirements of the statute under which they claim protection. The mechanics' lien law was unknown to and is in contravention of the common-law and equity jurisprudence. It had its origin with the civil law.

Canal Company *vs.* Gordon, 6 Wall., 561.
122 Minor *vs.* Marshall, 27 Pac. Rep., 481; 13 Pa., 167.

Yet it being remedial in its nature and equitable in its enforcement, is to be construed liberally. The equitable object of the act is clearly expressed in the first section in defining it: "Sec. 1519. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act."

This court held, in Finane *vs.* Hotel Company, 3 N. M., 256, that the law should be construed strictly, but the weight of authorities is against it, and that decision to that extent is here overruled.

Baldwin *vs.* Merrick, 1 Mo. App., 281.
Tuttle *vs.* Moutford, 7 Cal., 358.
Barnes *vs.* Thompson, 2 Swan (Tenn.), 313.

"Notwithstanding the mechanics' lien law was unknown to the common law, yet, in view of the equitable character of the statute, it should be liberally construed, but cannot by construction be extended to cases not provided for by statute."

Barnard *vs.* McKenzie, 4 Colo., 251.
15 Am. & Eng. Ency. Law, 179, and cases there cited.

But the notice of claim of lien, being the foundation of the action, must contain all the essential requirements of the statute, and the failure or omission on the part of the person claiming the lien of any of the substantial requisits of the statute is fatal and will defeat the action.

The tenth assignment of error is that the court below erred in establishing any lien whatsoever on the real estate, ditches, and reservoir system described in the decree and entered in said cause. This raised the question of validity of the notice of claim of lien. The authority for filing a claim of lien is found in sec. 1520, C. L. 1884, and a ditch is therein enumerated as one of the various kinds of property subject to a lien, and it provides that every person who performs labor upon or furnishes materials to be used in or upon the construction, alteration, or repair of the several kinds of prop-

erty therein enumerated "has a lien upon the same for the work or labor done or materials furnished by each respectively,
123 whether done or furnished at the instance of the owner of the building or other improvement or his agent;" and sec. 1522, which provides that "the land upon which any building, improvement, or structure is constructed, together with a convenient space about the same or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work or of the furnishing of the materials for the same the land belonged to the person who caused said building, improvement, or structure to be constructed, altered, or repaired, but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien."

This section goes to the quantity of the property to be charged and to the interest to be conveyed to and vested in the purchaser at the foreclosure sale. Sec. 1524 says: "Every original contractor, within ninety days after the completion of his contract, and every person save the original contractor claiming the benefit of this act, must within sixty days after the completion of any building, improvement, or structure, or after the completion of the alterations or repairs thereof, or the performance of any labor in a mining claim file[d] for record with the county recorder of the county in which such property or some part thereof is situated a claim containing a statement of his demands, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, with a statement of the term, time given, and conditions of his contract, and also a description of the property to be charged with the lien sufficient for identification, which claim must be verified by the oath of himself or some other person."

It will be seen by this section that the notice of claim of lien must contain five essential allegations or averments, and each must be stated substantially in the language of the statute, but no particular form of statement is required. All that is necessary is that the language used in the statement must carry and express in an intelligent manner the meaning and intent of the statute. To hold otherwise would be in effect in many instances to defeat a just and equitable claim on mere technicalities. This the legislature did not intend. The best manner in which to determin- the validity of the notice of claim of lien in this case is to state each requirement of the statute and the averments in the notice of claim of lien applicable thereto, and this course will hereinafter — pursued.

This section is given in full, because the lien is based upon its requirements and must be tested by it, and on it the lien and the action as to the validity of the notice of claim of lien must stand or fall.

The record discloses that the notice of claim of lien was seasonably filed and recorded; that it was properly verified by the
124 oath of the appellee, and that the action on the same was commenced within one year thereafter and within the time prescribed by the statute.

But appellants contend that none of the other requirements in this section were complied with, and that therefore there never was nor is there now any lien at all on the property as described and herein sought to be charged. This controversy can only be determined by a careful comparison of the essential requirements set out in this section with the allegations in appellee's notice of claim of lien.

This section requires, first, "a claim containing a statement of his demands after deducting all just credits and offsets."

After describing the property the notice of lien says: "To secure the payment of the sum of seventeen thousand six hundred and thirty-four dollars and twenty-seven cents, the balance due and owing to said Patrick P. Ford by the aforesaid owner or reputed owner, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said The Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien, as also for the further sum of three hundred and ninety dollars for extra excavating and hauling ordered by the engineer in charge of said ditch and allowed him in pursuance of the provisions of the said contract; all of which having been begun on, to wit, the first day of November, 1888, and prosecuted continuously until the twenty-first day of June last past."

Second. "With the name of the owner or reputed owner, if known."

The notice of lien says, after naming the Springer Land Association, certain individuals connected therewith, the Maxwell Land Grant Company and certain individuals as its trustees, "owners or reputed owners," and further on it says the sum due and owing to said Ford "by the owners or reputed owners" of the land before described, and in closing it says, "The names of the reputed owners of the land hereinbefore mentioned are the
125 Maxwell Land Grant Company and certain persons therein named as trustees of said company, acting under the name, style, and title of the board of trustees of the Maxwell Land Grant Company." It is here seen that names of the owners or reputed owners of the lands are mentioned three times, and the proof shows and it is admitted by both parties that the twenty-two thousand acres of land sought to be subjected to the lien belong to the Maxwell Land Grant Company, and it is equally clear from the allegations, proofs, and admissions in the answer that the ditch system and right of way is the property of the Springer Land Association and of the individuals composing it; and as the notice of lien and bill of complaint used the language of the statute and is sustained by the proofs, it is sufficient.

Miner *vs.* Marshall, 27 Pac. Rep., 481.
Harrington *vs.* Miller, 4 Wash., 808.
Allen *vs.* Rowe, 23 Pac. Rep., 901.

Third. "And also the name of the person by whom he was employed or to whom he furnished materials."

The notice of lien says: "Claimant was employed to do said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president."

It would be difficult to observe that requirement more fully than it is by this statement, and it is sufficient.

Fourth. "With a statement of the terms, time given, and conditions of his contract." The notice of lien avers that "the terms, time given, and conditions of said contract are those that fully appear in the copy of the said contract, which is attached hereto and made a part hereof;" and by reference to the contract and specifications filed and recorded, with the notice of claim of lien, as a part thereof, it will be seen that the contract provides that "said party of the first part (appellee) agrees to begin work within ten days after signing this contract and to complete the same on or before July 1st, 1889. The party of the second part (the Springer Land Association) agrees to pay said first party for work so
126 done at the rate of eleven cents per cubic yard without classification, and the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached." By reference to the specifications it is found as follows, viz: "15 estimates; on or about the first day of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month. He will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten per centum retained, will be paid to the contractor in cash within ten days thereafter. The retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfill his obligations will work a forfeiture of this retained percentage to the company. The amount due the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work."

The contract for the work was signed October 26th, 1888, and it here appears that the terms of the contract were eleven cents per cubic yard for all earth removed without classification, and the time given was ten days after the signing of the contract to the first day of July, 1889. The conditions of the contract were that the contractor should perform the labor in accordance with the contract and specifications, and that the company should pay him at the stipulated price from the first to about the middle of each month, in cash, for the work performed during the preceding month, less the retained percentage, which was to be paid with the final estimate when the work was completed on a satisfactory showing that the property was then free from all danger from liens and claims through the fault or neglect of the contractor.

127 But appellants contend with much earnestness that it was not a sufficient compliance with the statute to give the terms, time, and conditions of the contract by simply attaching the contract and specifications to the notice of claim of lien as a part thereof, and rely upon it as sufficient notice to the world of the contractor's claim of lien on the property sought to be charged, and that it would be too much to require persons searching the voluminous record of the notice of claim of lien, the contract, and specifications in a matter of this importance; but this contention cannot be maintained, because the searcher of the notice of the lien has his attention called to the contract as a part thereof, and the contract calls his attention to the specifications as a part of it, and on reading the entire record he is given full and ample notice of all of its conditions. This is the most satisfactory manner in which the public could possibly be advised of the notice of an intention to claim a lien and to fix an incumbrance upon the property therein described.

Knabb's appeal, 10 Pa. St., 186.

McLaughlin *vs.* Shaughnessey, 42 Miss., 520.

Phil. Mech. Liens, sec. 405.

Fifth. "And also a description of the property to be charged with the lien sufficient for identification."

The averment in the notice of claim of lien is that he, Fords, files his claim "against all that certain ditch, canal, and reservoirs, commonly known as the Cimarron ditch, and its accessories, the said ditch beginning at a point where the Ponil and Cimarron rivers meet to form the Cimarron rivers; thence continuing in a devious course eastwardly to a point on the Atchison, Topeka and Santa Fe railroad, about five miles northeast of the town of Springer, in Colfax county, Territory aforesaid, being in length about 26 miles,
128 and said ditch and land appurtenant thereto for right of way, being of the uniform width of sixty feet, together with all lateral ditches and reservoirs and the land covered by and appurtenant to the same as aforesaid, as also twenty-two thousand acres of land appurtenant to said ditch, the said land being also in said county and under the ditch to be irrigated thereby and described according to the townships and sections." Here follow the numbers of forty-six sections of land according to the legal subdivisions of the Government survey, and "all of which ditches, laterals, reservoirs, and lands as aforesaid are platted and laid out on the plan hereto attached and made part of this claim of lien."

The same descriptions of all the property sought to be charged in the notice of lien are given and averred in the bill of complaint and in the answer and cross complaint of appellants The Springer Land Association and the individuals composing it and admitted as correct. There is no denial either in the pleadings or in the proofs that the description is in any particular erroneous. The description of the ditches, laterals, reservoirs, and right of way is amply "sufficient for identification" and to enable any one familiar with that locality to go upon, survey, and plat the same with sufficient accuracy should it become necessary.

The twenty-two thousand acres of land sought to be charged is described by legal subdivisions according to the statutes and rules prescribed for the surveys of the public lands of the United States. There is no other way in which a description of lands can be given more satisfactorily than by the legal subdivisions of the public surveys. Such a statement must be held a specific description of the ditches, laterals, reservoirs, right of way, and of the lands, and a full compliance with all the essential requirements of the statute.

After a careful consideration of all the facts, claims, statements, and demands set out in the notice of claim of lien, averments
129 in the bill of complaint, and admit-ions in the answer thereto, it is found and so held that the notice of claim of lien is well founded and is in full and substantial compliance with all the essential requirements of the statutes on that subject, and that it has the force and effect to and does subject the said ditches, laterals, reservoir, and right of way and the real estate thereto pertaining as described therein to the demands of said appellee.

The most difficult proposition in the whole case is the effort on the part of the appellee to subject the twenty-two thousand acres of land not included as a part of the ditch system to the force and effect of his lien as a security for the satisfaction of his demands, in payment for his labor in constructing the ditch and reservoir system. This requires a most careful consideration of the further proposition, viz., how far a lien becomes effectual as to property beyond that upon which labor, materials, and skill have actually been expended in improvements and betterments upon a particular tract of land.

Appellants contend, with much force, that the lien cannot extend and attach under any possible construction to the twenty-two thousand acres, 1st, because the improvements were not put upon it; 2nd, because it belonged to the Maxwell Land Grant Company at the time the contract was made with Ford; and 3rd, because there is no averment in the notice of lien or in the bill of complaint that the land was necessary as and for "a convenient space about the same or so much as may be required for convenient use and occupation thereof," as provided by section 1522, *supra*.

These three propositions will be considered together, and the statute applicable to the first proposition is sec. 1529. Every building or other improvement mentioned in section 1520, constructed upon any lands with the knowledge of the owner or a person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of
130 this act, unless such owner or person having or claiming an interest therein shall within three days after he shall have obtained knowledge of the construction, alteration, or repairs or the intended construction, alterations, or repairs give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon said land or upon the building or other improvement situate thereon." So much of sec. 1520

as applies here is as follows: "Every contractor, subcontractor * * * or other person having charge * * * of any building or other improvement as aforesaid, shall be held to be the agent of the owner, for the purposes of this act."

This action is purely statutory, and the purpose in quoting *in extenso* from these sections is to give force and effect in so far as possible to the legislative intent in enacting the mechanics' lien laws and to arrive at the proper and just conclusions therefrom as applied to facts in the record.

The plat of the land refer-ed to in the notice of lien and in the pleadings as giving a description of the property sought to be charged is omitted from this record, and it is not clear from the record just what section of the land the line of the ditch passed over, but that it does traverse some of them is very clear. Though in the construction of a ditch the improve- may be limited to the land and the right of way, sixty feet in width and twenty-six miles in length, yet it is clearly apparent from the record that this ditch and reservoir enterprise was intended to and did improve and enhance the value of all the lands to be irrigated by it. In the contract made by the Maxwell Land Grant Company and the predecessors in interest of the Springer Land Association it is stated that "the party of the first part, with a view of selling at an enhanced value certain land amounting to about twenty-two thousand acres," the same lands here in question, for and in consideration of certain perpetual water rights and privileges, and for a certain part of the proceeds to be derived from the sale of the lands when sold, "agrees to and with the parties of the second part, that he, the representative of the Maxwell Company, will reserve, set apart, and hold from sale, except as hereinafter provided, said twenty-two thousand acres of land under the ditch system hereafter provided, and the parties of the second part agree to expend the sum of sixty thousand dollars or so much as might be necessary without delay to complete
131 the ditch system, as a consideration for the water rights, right of way, and for their share of the proceeds from the sale of the lands when sold."

Appellants The Springer Land Association and its associates in their cross-complaint set out this contract and made it a part thereof; averred that they had sustained damages in large sums on the ground of the alleged failure of Ford to comply with the terms of his contract to complete the same, in that they had at great expense secured purchasers for the land at good prices, but that by reason of appellee's lien having been filed the- could not complete the same, and that they had at great expense in the spring of 1890 established a "model farm" adjacent to and to be irrigated by said ditch system. It is clearly apparent from all the pleadings and proofs in the record that the only object in constructing the ditch and reservoir system was to improve and enhance the value of and render marketable the said twenty-two thousand acres of land. The appellants admit in their answer and aver in their cross-complaint the execution of the contract, and that the Springer Land Association was the successor in interest therein. The Maxwell Land Grant Company, its trustees and agents, had full notice of the

Ford contract and had ample knowledge that the same was being executed by Ford as the original contractor, and it is nowhere contended that it or its agents or trustees gave any notice that the company or its trustees would not be responsible for the work.

Appellants contend that the land can only be subjected to the lien by a showing that it is "required for the convenient use and occupation of the improvement," and then only "if at the commencement of the work * * * the land belonged to the person who caused said improvement or structure to be commenced," because there being no allegation in the bill of complaint that the said land was so required.

The claim of lien alleges that the land is appurtenant to the ditch "and under the ditch to be irrigated thereby and described by sections and townships," and the bill of complaint also alleges the same fact, and this is admitted by the answer. It was so "determined by the court below on rendering its judgment," and
132 the decree ordered the sale of so much of said twenty-two thousand acres of land as may be necessary to satisfy the demands of the appellee. All the proofs go to show that the land is appurtenant to and to be benefited by the ditch. This objection was raised for the first time in this court, and for that reason, if nothing else, is not well taken. The term "so much as may be required for the convenient use and occupation thereof" means all the land benefited and the value of which is increased or enhanced by the improvements actually made upon the land appurtenant and adjacent thereto and for which such improvements are made at the instance, knowledge, or consent of the owner or reputed owner thereof.

A ditch requires much more land for a convenient space, use, and occupation than a house, wall, or fence, and a lien will attach for the construction of either, and no one would contend that the space would be limited to the land actually occupied by either.

A lien may attach for the planting of a fruit orchard, and it could not be contended that only the space actually occupied by each tree would be subjected to the effects of the lien, but it would attach to the whole tract upon which the orchard was planted.

To hold that this lien attaches only to the ditch system, twenty-six miles long and sixty feet wide, would be in effect to render the security for the payment of appellee's demands practically valueless and to defeat the very spirit and intent of the law on which he had the right to rely for protection to secure payment for his labor. When the legislature enacted the mechanics' lien law it meant to provide security and to say to the laborer, either skilled or unskilled, and to the materialman that when he improves property with his skill, labor, or material that all the property so improved in value shall be held by him as security until his demands are paid in the manner provided by the statutes.

The following authorities are cited in support of this proposition:

Davis *vs.* Auxiliary Company, 9 S. C., 204.

Roby *vs.* University of Vermont, 36 Ver., 564.

Vandyne *vs.* Vanness, 1 Halstead N. J. Eq., 485.
133 Nelson *vs.* Campbell, 28 Pa. St., 156.

In Green *vs.* Chandler, 54 Cal., 626, it was held that all the lan was subjected to the lien, but there was no allegation in th complaint that it was necessary as a convenient space, and that th proof to that effect was not sufficient without such allegation sustain the judgment; but it is alleged in this case in the lien clai which is made a part of the bill of complaint and alleged therei and admitted in the answer that the land is appurtenant to th ditch. The court below found and determined on rendering the judg ment and decree that the twenty-two thousand acres were "require for convenient use and occupation thereof," and it is sustained b the proofs and is sufficient, and the lien does attach to and subjec the said twenty-two thousand acres to the effect thereof.

It is contended by the appellants that even if the lien does attac and become effectual as to this land it is excessive, because th forty-six sections described make twenty-nine thousand four hun dred and forty acres. This is on the theory that all the section were full; but there is no proof to sustain that conclusion. Appel lants admit in their answer "twenty-two thousand acres of land i said county and under said ditch, and to be irrigated thereby and described as follows." Then follows the sections by number, town ship, and ranges according to the Government surveys, and they are now estopped from setting up that these sections contain more than the quantity they admitted in their answer.

The description shows that about sixteen of these sections are bounded by the northern and western range lines, and U. S. Rev Stat., sec. 2395, provides that "where the exterior lines of the town ship which may be subdivided into sections or half sections exceed or do not exceed six miles the excess or deficiency shall be specially noted and added to or deducted from the western and northern ranges of sections or half sections in such townships, according as the error may be in running the lines from east to west or from north to south."

While the court is asked to presume that all the forty-six
134 sections contain the legal quantity, it may, in the absence of any other proof than appears here, with equal propriety pre sume that the discrepancy is accounted for by the deficiency in legal quantity by the statute and rules of Government surveying. Besides, quantity in the description of land is not the governing rule as against definite descriptions by metes and bounds or by name and number. In Jackson *vs.* Moore, 6 Cow., 706, the conveyance purported to include two tracts of land, being townships No. 3 in the 5th range and also No. 4 in the 6th range, to be six miles square, and containing twenty-three thousand and forty acres each and no more; but as these tracts were in fact six by eight miles in size, the court held that the whole passed. Sutherland, J., in delivering the opinion said: "It is perfectly settled that when a piece of land is conveyed by metes and bounds or any other certain description all included within those bounds or that description will pass, whether it be more or less than the quantity stated in the deed; and where the quantity is mentioned in addition to a description of the boundaries or other certain designation of the land, without an

express covenant that it contains that quantity, the whole is considered as mere description. The quantity, being the least certain part of the description, must yield to the boundaries or number if they do not agree." Stanley *vs.* Green, 12 Cal., 148. "While there may be a mistake respecting the courses and distances as to the boundaries of a tract of land or as to the quantity of acres or leagues it contains, there can be none when its extent is defined by permanent natural monuments." De Arguello *vs.* Greer, 26 Cal., 616; Wadhams *vs.* Swan, 109 Ill., 46; Ufford *vs.* Wilkins, 33 Ia., 110. "The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description. Neither party has a remedy against the other for the excess or deficiency unless the difference is so great as to afford a presumption of fraud." 2 Devlin on Deeds, sec. 1044. And where land is described by Government survey and by metes and bounds as containing a given number of acres the words as to quantity are held
135 merely as descriptive. Hatch *vs.* Garza, 22 Tex., 177; Belden *vs.* Seymour, 8 Conn., 18; Wright *vs.* Wright, 34 Ala., 194.

The general rule in such cases is that where quantity is given in a conveyance without an express covenant that the exact number of acres only shall pass, the quantity specified, being less certain, is merely descriptive — must yield to the description as to metes and bounds by permanent monuments and numbers according to the Government surveys, they being the more certain. Doe *vs.* Porter, 3 Ark., 57; Chandler *vs.* McCord, 38 Me., 564; Dale *vs.* Smith, 1 Del. Chan., 1; Jennings *vs.* Monk, 4 Metcalf (Ky.), 106.

But it is not quite clear just what standing the Maxwell Land Grant Company had in the court below or in this court, for the reason that the record here discloses the fact of the acceptance of service by its attorney and its appearance in the lower court by attorney, but it does not disclose any pleadings of any kind in its defense.

Appellants contend in their seventh assignment that the amount found for appellee in the court below is excessive, in that from the amount allowed should have been deducted eight thousand dollars on account of land agreed to be taken by appellee under his contract made between him and the Springer Land Association on October 25, 1888. Under the provisions of that contract Ford agreed to select one section of land of six hundred and forty acres under the ditch and to pay eight thousand dollars for it and to let that go as a credit and as a payment on his contract on the final estimate, and the Springer Association agreed to secure from the Maxwell Company a deed for the same free from all incumbrances and deliver it to Ford.

There is some proof as to the making of the deed by the Maxwell Company, but there is not sufficient evidence to establish such a tender of it to Ford by the Springer Land Association according to the terms and conditions of the contract as the law requires, and Ford was not bound in law to accept it and deduct that sum from his demands.

It is contended in the thirteenth assignment of errors that
136 before appellee can recover he should have satisfied and removed the liens filed by the subcontractors.

The record shows that the subcontractors did not file liens until the appellants refused to pay the original contractor on the final estimates, and the original contractor filed his lien first, as he had a right to do, for all the money due him, including the several amounts due the subcontractors, and that was the reason then given for the refusal of payment on the final estimates, and there was due Ford at that time, on the May estimate, over five thousand dollars, and over twelve thousand six hundred dollars on the final estimate.

There is nothing to show that Ford had not promptly paid his subcontractors out of the money received or that he was not responsible for the money due his subcontractors; on the contrary, he said he would settle with them as soon as he was paid, and this was before any liens were filed, and the filing of Ford's lien was brought about by reason of the failure of appellants The Springer Land Association to pay him according to the terms of the contract, and they should suffer for their own laches and not Ford. It could not be maintained that Ford should or could pay the subcontractors until he received his money for the work. To hold otherwise would be both unreasonable and unjust.

The sixth assignment is that it was error "in providing that the decree entered in said cause should operate as a personal judgment against each of the appellants The Springer Land Associates and its associates."

There are no authorities cited in the briefs of appellants or appellee in support of or against this proposition and we have no statute on the subject. In equitable proceedings a court of chancery will when it is possible afford a complete remedy, but it has been held in a States where there is no statute authorizing a deficiency judgment in foreclosure proceedings that it cannot be entered. Noon *vs.* Braty, 2 Black (U. S.), 499; Orchard *vs.* Hubes, 1 Wall., 73.

Our statute provides as follows:

"SEC. 522. The said supreme and district courts, in the exercise of chancery jurisdiction, arising under all causes and matters in equity, shall conform in their decisions, decrees and proceed-
137 ings to the laws and usages peculiar to such jurisdiction in this Territory, and the supreme, circuit and district courts of the United States."

By the rules of practice for the courts of equity of the United States it is provided as follows:

"92. Ordered that in suits in equity for the foreclosure of mortgages in the circuit courts of the United States or in any court of the Territories having jurisdiction of the same a decree may be rendered for the balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice when the decree is solely for the payment of money." This rule amended rule 8, which provided, among other things, that "final process to execute

any decree may, if the decree be solely for the payment of money, be by a writ of execution in the form used in the circuit courts in suits at common law in actions of assumpsit." U. S. Supreme Court Rules.

The bill of complaint contains a proper prayer in case of deficiency, and there was no error in the court below in entering a deficiency judgment and order for the writ of execution to issue in that event. Dodge *vs.* Freedman's Savings & Trust Co., 106 U. S., 445.

138 Appellants contend further that "the amount decreed is unauthorized by the facts" on the ground that the Springer Land Association was not bound to pay simply on the estimates found by the engineer for the reason that the amount certified by the engineer was to be "audited by the company" before payment and that the word- in specification 15 "meant to examine and adjust," and that this is a reserved power in the appellants, and that *it* had authority under that reservation to examine all statements and estimates made by the engineer before they were, under the terms of their contract and specifications, required to pay the amounts so certified, and that such estimates were not conclusive as against appellants.

To maintain this contention the Springer Land Association would have had to send a man to examine, measure, and compute the work reported on by the engineer at the close of each month before any payments could have been made.

It would require superhuman ingenuity to construe the contract and specifications to support this proposition; such a construction is excluded by the very words and terms of the specifications. It says, "On or about the first of each current month the engineer *with* measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten per centum retained, will be paid to the contractor in cash within ten days thereafter." The words "audited by the company," as here used, meant that the company would examine and compare each estimate and the vouchers with previous estimates, vouchers, and payments allowed and made by the company. The word "audit" is defined in the Century Dictionary as meaning "to make audit of, examine, and verify by reference to voucher; as an account or accounts; as to audit the account of a treasurer." Webster defines it to "compare the charges with the vouchers." There was nothing left for the company to do but to pay on the estimates furnished by the engineer or to refuse to do so and declare the contract void as to that condition. It refused to audit and pay the estimates, and it cannot now be heard to plead its own default.

139 Appellants contend that the court erred in its findings of facts and conclusions of law in that they were not sustained by the proofs.

As before stated, the cause was referred to a special examiner, who

took and reported the testimony to the chancellor, and he arrived at his conclusions on the facts and the law from the arguments and authorities cited by counsels and the facts contained in the record, and the whole record is here for review in just the same manner that it was before the chancellor, and it becomes the duty of this court to pass upon it without reference to the findings of fact and conclusions of law in the lower court. In this it is to be distinguished from the findings of facts by a special master appointed by the court by and with the consent of all parties in interest, and this court will pass upon the whole record and review, affirm, or reverse the decision of the court below where the reference was to an examiner only. The master who sees the witnesses, hears them testify, and observes their manner while upon the stand is supposed to be more competent to determine and pass upon their credibility and arrive at a correct conclusion as to the facts than a chancellor from mere reading of the testimony, and where the chancellor sits in the case and hears the witnesses testify orally his findings are in the nature of the verdict of a jury and will be so treated by the appellate tribunal and will not be reviewed unless it is appearant from the record that such findings of facts are not sustained by a preponderance of the evidence to the same material facts in the case.

There were a great many witnesses examined orally and a vast number of depositions taken and numerous exhibits offered on both sides, and it is impossible and impracticable in this opinion to review and rehe-rce the testimony found in the record. There are contradictions, criminations, and recriminations from almost the begin-ing to the close of the record, most of which were directed at and to the construction of reservoir No. 7, on the part of appellants, that it was not constructed in a substantial and work-
140 manlike manner and in accordance with the contract and specifications.

The appellee offered witnesses to prove that the dam and reservoir had been constructed in substantial compliance with the contract, and while there is some contradictions to his proofs by witnesses for the appellants it is not sufficient to overcome that of appellee's, and after a careful examination of all the evidence on this point it is found that the work was done in substantial compliance with the contract and specifications.

There seems to be little controversy as to the completion of the ditch, and the evidence shows that it was completed by Ford substantially as he agreed in his contract.

Efforts were made on the part of appellants to show that E. H. Kellogg, the supervising engineer, was during the greater part, if not all, — the time that the work was progressing under the influence of Ford, and that his estimates were incorrect and fraudulent, and that he was incompetent, and to establish this witnesses and expert engineers were put upon the stand to prove it.

One engineer was brought from Chicago, who spent some two months in "experting" the whole work for the Springer Land Association during the summer of 1889, and he reported as the result of his investigations descrepancies in the work, as is usually the case

in the testimony of expert witnesses. He was in the employ of appellants and did his work for them, and he was by no means a disinterested witness. As a general rule there is no testimony so unsatisfactory or so unreliable in the every-day affairs of life or that is so misleading or that results so disastrously to just and equitable conclusions in the homely affairs of business men as that of experts.

The proofs utterly fail to establish that Kellogg was either dishonest or incompetent or in any manner under the baneful
141 influence of Ford or any one else. Kellogg was the man mutually agreed upon to do the work by the Maxwell Land Grant Company and the Springer Land Association, and he was agreed upon by the Springer Land Association and Ford as supervising engineer and placed in charge of the work, and officers and agents of appellants were upon the ground and inspecting the work from its inception to its completion and had ample opportunity to investigate and report any misconduct on the part of Kellogg, but there were no objections made by any one to him until after difficulties arose between the parties. He was in constant communication with all the parties, and furnished them regular estimates from time to time as his duties required. The perusal of the record will disclose the vast amount of work done by him, and it is found that he did it apparantly with satisfaction to all conserned until after their difficulties came up and after the work was about completed. The proofs show that Kellogg had been engaged for a great many years in constructing irrigating plants in different parts of the country, and it also shows that he gave general satisfaction in other work of a similarr character in this Territory. Before a court will stamp a man as incompetant and a falsifier in his particular profession or line of buisiness, after sustaining a good reputation as such for more than twenty years, the proofs must be positive and convincing to the contrary. A character established for competency and honesty in a profession, occupation, or a particular line of business is a thing of value to any man, and it must not be brushed aside and held for naught on mere allegations and meaningless generalities.

— the view here taken of this case it becomes unnecessary to consider any of the other assignments of errors by appellants.

After a careful consideration of all the record it is found that weight of the evidence sustains the findings of facts by the court below, and the judgment and decree is affirmed, with directions to the lower court to make such order as will carry the same into effect.

N. B. LAUGHLIN, *A. J.*

We concur.

THOMAS SMITH, *C. J.*

N. C. COLLIER, *A. J.*

Justices Hamilton and Bantz did not sit in the case and took no*t* part in this opinion.

142 TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Supreme Court.

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a full, true, and perfect transcript of such portions of the record is said cause as said appellants deem necessary for review in the Supreme Court of the United States as the same remains on file and of record in my office.

Seal Supreme Court, Territory of New Mexico.

Witness my hand and the seal of said court, at Santa Fé, New Mexico, this 18th day of November, A. D. 1895.

GEO. L. WYLLYS, *Clerk.*

143 In the Supreme Court of the United States.

PATRICK P. FORD, Complainant and Appellee,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. BARNS, MELVILLE W. MILLS, WILLIAM J. TEWKESBURY, FREDERICK J. EAMES, WILLIAM A. COMSTOCK; The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company, a Corporation; RUDOLPH V. MARTINSEN, CHARLES FAIRCHILD, NICHOLAS THOURON, SAMUEL L. PARRISH, MARTINUS P. PELS, HENRY M. PORTER, and FRANK SPRINGER, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of The Maxwell Land Grant Company, Defendants and Appellants.

Appeal from the Supreme Court of the Territory of New Mexico.

Now come said appellants, by their counsel, and say that in the record and proceedings of the supreme court of the Territory of New Mexico in the above-entitled cause there is manifest error in this, to wit:

1. That the said supreme court of New Mexico affirmed the decree of the district court for the fourth judicial district of New Mexico, sitting in and for the county of Colfax, in favor of said appellee, adjudging a lien upon the lands in said decree mentioned for the sum of $22,097.15 and ordering the said lands sold to satisfy the same, whereas upon the law and facts of said cause the said decree should have been reversed or modified.

Also in this, to wit, that the said supreme court, as by its opinion appears, held, decided, and adjudged as follows:

2. That the claim or notice of lien to foreclose which said action was brought was sufficient in law to create a lien upon the lands

described in the bill of complaint and decree of said district court also

3. That the land described in the bill of complaint and decree of the district court, outside of the ditches, reservoirs, and other improvements, and the land on which the same are situate, and
144 the right of way for the same, are subject to the said lien and were properly included in the decree of the district court foreclosing the same; also

4. That the defendant The Springer Land Association was not entitled to be credited, on the final estimate of the work done by complainant Ford, with the sum of $8,000 for and on account of six hundred and forty acres of land which was to have been taken in payment for said work to that amount under the agreement of October 25th, 1888; also

5. That there had been no sufficient tender of the deed for said land in assignment of error number four mentioned, and that complainant Ford was not bound in law to accept such deed and deduct the said sum from his demands; also

6. That the sum claimed in and by the notice of lien was due and the lien therefore valid, notwithstanding the existence of liens upon the same property for unpaid debts due his subcontractors by complainant Ford; also

7. That complainant Ford was not required to satisfy and remove the liens filed by his subcontractors upon the premises in question before the final estimate for complainant's work should become due and payable; also

8. That the amount claimed under said lien was due at the time such lien was filed, notwithstanding the estimates of the engineer therefor had not been audited by the company; also

9. That the mechanics' lien law of New Mexico, under which the lien in question was filed and sought to be foreclosed, is to be construed liberally.

Wherefore, and for divers other errors apparent on the face of said record, appellants pray that the said judgment of said supreme court of New Mexico may be reversed, annulled, and for naught held, and that said supreme court of New Mexico may be directed to
145 enter a judgment reversing the decree of said fourth judicial district court or modifying the same as equity may require.

Oct. 23, 1895.

FRANK SPRINGER,
Solicitor for Appellants.

146 [Endorsed:] No. —. Supreme Court of the United States. Patrick P. Ford *vs.* The Springer Land Association *et al.* Assignment of errors.

Endorsed on cover: Case No. 16,108. New Mexico Territory supreme court. Term No., 89. The Springer Land Association *et al.*, appellants, *vs.* Patrick P. Ford. Filed December 9, 1895.